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## The Structure of Blackstone's Commentaries

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# THE STRUCTURE OF BLACKSTONE'S COMMENTARIES

DUNCAN KENNEDY

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# THE STRUCTURE OF BLACKSTONE'S COMMENTARIES

DUNCAN KENNEDY\*

*[T]he material relations of production of the capitalist epoch only are what they are in combination with the forms in which they are reflected in the pre-scientific and bourgeois-scientific consciousness of the period; and they could not subsist in reality without these forms of consciousness.<sup>1</sup>*

## INTRODUCTION

This article is a version of the first chapter of a book on the history of American legal thought. It has two purposes. The first is to provide an introduction to Blackstone's *Commentaries on the Laws of England*, an important 18th century legal treatise that all legal scholars have heard of but practically no one knows anything about. The second is to introduce the reader to a method for understanding the political significance of legal thinking, a method that might be called structuralist or phenomenological, or neo-Marxist, or all three together.

I don't intend to provide any background information on Blackstone, except to say that he published his treatise in England between 1765 and 1769, and that aside from Chancellor Kent's *Commentaries on the Laws of the United States*, published between 1820 and 1825, Blackstone's work is the only systematic attempt that has been made to present a theory of the whole common law system. It is the single most important source on English legal thinking in the 18th century, and it has had as much (or more) influence on American legal thought as it has had on British.

The method this study exemplifies is, like the *Commentaries*, familiar in name but altogether unfamiliar in practice to most American legal scholars. For this reason, I begin with a methodological excursion. As for the origins of the method, let me say only

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\* Professor of Law, Harvard Law School. Copyright © 1979, Duncan Kennedy. This essay is dedicated to Stanley Sheldon, Edith Caudill and Edward Ryerson. Numerous colleagues and friends have commented on this and an earlier draft. I would like to thank all of them, and especially Jerry Frug, Tom Green and Morty Horwitz, for their help. Errors are mine alone.

1. K. KORSCH, *MARXISM AND PHILOSOPHY* 88-89 (F. Halliday trans. 1970).

that I am trying to apply to legal thought techniques developed over two centuries in what is sometimes called the "continental" tradition of philosophy, social theory, history, psychology and anthropology.<sup>2</sup> My approach owes a great deal to the work of Peter Gabel<sup>3</sup> and Roberto Unger,<sup>4</sup> and to that of Al Katz, whose essay in this issue of the *Buffalo Law Review*<sup>5</sup> has greatly influenced my thinking.

Everything that I will have to say flows from (but is in no sense logically entailed by) a premise about legal thinking. This premise is that the activity of categorizing, analyzing, and explaining legal rules has a double motive. On the one hand, it is an effort to discover the conditions of social justice. On the other, it is an attempt to deny the truth of our painfully contradictory feelings about the actual state of relations between persons in our social world. In its first aspect, it is a utopian enterprise constituting, in E.P. Thompson's phrase, a "cultural achievement of universal significance."<sup>6</sup> In its second aspect, it has been (as a matter of historical fact rather than of logical necessity) an instrument of apology—an attempt to mystify both dominators and dominated by convincing them of the "naturalness," the "freedom" and the "rationality" of a condition of bondage. I will be concerned in this paper with the second aspect—of denial and apology—but I don't want to be understood to deny the first, utopian aspect.

From this perspective, Blackstone is important on three distinct grounds. First, he was a pivotal figure in the development

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2. The works that have most influenced me are G. HEGEL, *THE PHILOSOPHY OF RIGHT* (T. Knox trans. 1952); G. HEGEL, *THE PHENOMENOLOGY OF MIND* (J. Baillie trans. 1967); K. MARX, *On the Jewish Question*, in *EARLY WRITINGS* (R. Livingstone & G. Benton trans. 1975); I. KARL MARX, *CAPITAL* (R. Fowkes trans. 1976); K. MARX, *CRITIQUE OF THE GOTHA PROGRAMME* (1875); G. LUKACS, *Reification and the Consciousness of the Proletariat*, in *HISTORY AND CLASS CONSCIOUSNESS: STUDIES IN MARXIST DIALECTICS* (R. Livingstone trans. 1971); G. KOHLER, *GESTALT PSYCHOLOGY* (1947); J. PIAGET, *PLAY, DREAMS AND IMITATION IN CHILDHOOD* (C. Gattegno & F. Hodgson trans. 1962); C. LEVI-STRAUSS, *THE SAVAGE MIND* (1966); K. MANNHEIM, *IDEOLOGY AND UTOPIA: AN INTRODUCTION TO THE SOCIOLOGY OF KNOWLEDGE* (1936); and H. MARCUSE, *REASON AND REVOLUTION: HEGEL AND THE RISE OF SOCIAL THEORY* (1941).

3. Gabel, *Intention and Structure in Contractual Conditions: Outline of a Method for Critical Legal Theory*, 61 MINN. L. REV. 601 (1977); Gabel, Book Review, 91 HARV. L. REV. 302 (1978); P. Gabel, *Reification in Legal Reasoning* (unpublished ms. 1979).

4. R. UNGER, *KNOWLEDGE AND POLITICS* (1975); R. UNGER, *LAW IN MODERN SOCIETY* (1976).

5. Katz, *Studies in Boundary Theory: Three Essays in Adjudication and Politics*, 28 BUFFALO L. REV. 383 (1979). *Studies in Boundary Theory: Part I: Six Essays on Crime and Criminal Law* (unpublished ms. 1978) has especially influenced me. Although I do not use his terminology, this article is intended to be a "study in boundary theory" in exactly his sense.

6. E.P. THOMPSON, *WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT 265* (1975).

of what I will call the liberal mode of American legal thought. His work set out together, for the first time in English, all the themes that right to the present day characterize attempts to legitimate the status quo through doctrinal exegesis. Second, he presented these familiar arguments and categories as parts of a larger structure that is quite unfamiliar to the modern reader. By analyzing that structure, we can get a sense of the contingency of our accustomed modes of thought in approaching what seem the most elementary legal issues.

Third, Blackstone is supremely unconvincing. Although he made many contributions to the utopian enterprise of legality, his *Commentaries* as a whole quite patently attempt to "naturalize" purely social phenomena. They restate as "freedom" what we see as servitude. And they cast as rational order what we see as something like chaos. At least since Bentham's *Fragment on Government*,<sup>7</sup> critics have linked these traits of the *Commentaries* to Blackstone's desire to legitimate the legal status quo of the England of his day. Thus Blackstone serves both as a convenient starting point for the substantive history of American legal thought and as a relatively easy object for the method of discovering hidden political intentions beneath the surface of legal exposition.

## PART ONE

### METHODOLOGICAL PRELIMINARIES

What makes it so important to have an easy target is that it is quite hard to state either the "painfully contradictory feelings" to which I have already referred or to explain how legal thinking can effectively "deny" them.

#### *The Fundamental Contradiction*

Here is an initial statement of the fundamental contradiction: Most participants in American legal culture believe that the goal of individual freedom is at the same time dependent on and incompatible with the communal coercive action that is necessary to achieve it. Others (family, friends, bureaucrats, cultural figures,

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7. J. BENTHAM, A COMMENT ON THE COMMENTARIES: A CRITICISM OF WILLIAM BLACKSTONE'S COMMENTARIES ON THE LAWS OF ENGLAND (Everett ed. 1928). See also D. BOORSTIN, THE MYSTERIOUS SCIENCE OF THE LAW (1941); E. BARKER, ESSAYS IN GOVERNMENT 120-53 (2d ed. 1960); Dicey, *Blackstone's Commentaries*, 4 Cambridge L.J. 286 (1930).

the state) are necessary if we are to become persons at all—they provide us the stuff of our selves and protect us in crucial ways against destruction. Even when we seem to ourselves to be most alone, others are with us, incorporated in us through processes of language, cognition and feeling that are, simply as a matter of biology, collective aspects of our individuality. Moreover, we are not always alone. We sometimes experience fusion with others, in groups of two or even two million, and it is a good rather than a bad experience.

But at the same time that it forms and protects us, the universe of others (family, friendship, bureaucracy, culture, the state) threatens us with annihilation and urges upon us forms of fusion that are quite plainly bad rather than good. A friend can reduce me to misery with a single look. Numberless conformities, large and small abandonments of self to others, are the price of what freedom we experience in society. And the price is a high one. Through our existence as members of collectives, we impose on others and have imposed on us hierarchical structures of power, welfare, and access to enlightenment that are illegitimate, whether based on birth into a particular social class or on the accident of genetic endowment.

The kicker is that the abolition of these illegitimate structures, the fashioning of an unalienated collective existence, appears to imply such a massive increase of collective control over our lives that it would defeat its purpose. Only collective force seems capable of destroying the attitudes and institutions that collective force has itself imposed. Coercion of the individual by the group appears to be inextricably bound up with the liberation of that same individual. If one accepts that collective norms weigh so heavily in favor of the status quo that purely "voluntary" movement is inconceivable, then the only alternative is the assumption of responsibility for the totalitarian domination of other peoples' minds—for "forcing them to be free."

Even this understates the difficulty. It is not just that the world of others is intractable. The very structures against which we rebel are necessarily within us as well as outside of us. We are implicated in what we would transform, and it in us. This critical insight is not compatible with that sense of the purity of one's intention which seems often to have animated the enterprise of remaking the social world. None of this renders political practice

impossible, or even problematic: we can identify oppression without having overcome the fundamental contradiction, and do something against it. But it does mean proceeding on the basis of faith and hope in humanity, without the assurances of reason.

The fundamental contradiction—that relations with others are both necessary to and incompatible with our freedom—is not only intense. It is also pervasive. First, it is an aspect of our experience of every form of social life. It arises in the relations of lovers, spouses, parents and children, neighbors, employers and employees, trading partners, colleagues, and so forth. Second, within law, as law is commonly defined, it is not only an aspect, but the very *essence* of every problem. There simply are no legal issues that do not involve directly the problem of the legitimate content of collective coercion, since there is by definition no legal problem until someone has at least imagined that he might invoke the force of the state. And it is not just a matter of definition. The more sophisticated a person's legal thinking, regardless of her political stance, the more likely she is to believe that all issues within a doctrinal field reduce to a single dilemma of the degree of collective as opposed to individual self-determination that is appropriate. And analyses of particular fields tend themselves to collapse into a single analysis as soon as the thinker attempts to understand together, say, free speech and economic due process, or contracts and torts.

### *The History of the Contradiction (a)*

The all-pervasiveness of the sense of contradiction is the endpoint (by which I do not at all mean the "goal") of a long process of historical change. It is very difficult to conceptualize that history. I propose to begin with a shockingly crude model, and see where it will lead. Suppose that the fundamental contradiction has "always" existed, in its present degree of intensity and pervasiveness. We then need to account for the obvious fact that it has either not been experienced at all, or not acknowledged, by *any* of the succeeding generations of Western legal thinkers between the time of the sophists and the very recent past. Let us suppose that the reason for this has been that during that whole period there have existed processes of mediation, or denial, that have functioned to

hide or disguise it from those engaged in the enterprise of legal thought.

*Mechanisms of Denial: (a) Types of Legal Thinking*

Here is a preliminary statement of how legal thinking can be a mechanism for denying contradictions: Imagine a description that portrays the making of decisions in our situation of contradictory feelings as involving a tension between conflicting values that we must balance rationally. Such a description is untrue to our experience. Indeed, a person who so described the experience might well appear to be hiding from its reality. The bland rhetoric of tension and balance is so clearly false that we suspect a person who employs it of wanting to minimize or conceal the elements of paradox, stalemate and desperation we experience when we try to decide what kind of collective coercion is legitimate and what illegitimate.

There are at least two other modes for describing the situation that are even more patently untrue than balancing. The first of these is functionalism. In the functionalist mode, we decide which forms of collective action are legitimate by identifying tasks that supposedly must be performed in any social organization. We can then explain, and either justify or criticize, the types of collective action that actually occur by asking how well they fit into the idealized schema of functions thus identified.

A second mode is sometimes called formalism, by which is meant a system of thought that identifies some forms of collective intervention, such as the defense of private property and the enforcement of contracts, with the protection of individual freedom. This identification serves to legitimate some legal rules while delegitimizing others (for example, minimum wage legislation "violates freedom of contract"). That is, formalism resembles balancing and functionalism in that it allows us to deny the contradictory state of our feelings by asserting that there is a proper place for collectivism, and that that place can be determined by the rational analysis of the content of legal rules.

*Mechanisms of Denial: (b) Categorical Schemes*

While modes of legal reasoning are an important aspect of legal thinking, they are no more and perhaps less important than

the structure of categories available at any given moment for classifying different incidents of collective coercion. It is impossible to think about the legal system without some categorical scheme. We simply cannot grasp the infinite multiplicity of particular instances without abstractions. Further, the edifice of categories is a social construction, carried on over centuries, which makes it possible to know much more than we could know if we had to reinvent our own abstractions in each generation. It is therefore a priceless acquisition. On the other hand, all such schemes are lies. They cabin and distort our immediate experience, and they do so systematically rather than randomly.

The very existence of historically legitimated doctrinal categories gives the law student, the teacher and the practitioner a false sense of the orderliness of legal thought, of our practices and of our reasons for those practices. But the particular schemes adopted convey more particular falsehoods. The dichotomy of contract and tort, for example, has for generations conveyed the message that in the "private sector," individuals freely structure their relationships so long as they obey a set of ground rules that are enforced by the state but prescribed by elementary moral principles. The segregation of real property law from the rest of contract and tort law tells us that both limitations on contractual freedom and instances of strict liability with respect to land are a historical anomaly. The distinction between public and private law replicates the hidden message of tort versus contract: that the state stands outside civil society and is not implicated in the hierarchical outcomes of private interaction.

The notion of "a mode of legal reasoning" and the notion of "a categorical scheme" are not altogether distinct. Categorical schemes are products of the activity of legal thinkers. When thinkers are creating them, they employ modes of reasoning. Thus a thinker may find it necessary to justify the maintenance of a distinction between public and private law, and a particular choice about where to place, say, administrative regulation. She will appeal to "the nature" of things, or to the "functions" of the categories, or to a "balancing test," depending on the mode of reasoning then in use. If lawyers consciously made and remade the categories to fit their purposes, there wouldn't be much point in analyzing them apart from the reasoning process itself.

But even when we profess an extreme nominalism of this kind, we cannot maintain it in practice. Categorical schemes have



a life of their own. Most legal thinkers in any given period take both the existing structure and myriad particular categorizations for granted. They deploy their efforts at reasoning new situations into the category that will lead to the outcome they desire. The motives that underlie the structure as a whole are therefore likely to be buried deep, if not altogether inaccessible. In periods when there is little self-consciousness about the artificial character of *all* categories, even a legal thinker who knows she is engaged in a major effort to redefine the structure may have no idea how much choice is implicit in her activity. For these reasons, the study of categorical schemes is particularly fertile ground for the method of interpretation I am proposing.

### *The History of the Contradiction (b)*

Now let us return to our hypothesis about the history of legal thought as the history of the fundamental contradiction. We left off with the notion that previous generations did not experience or did not acknowledge the contradiction because the forms of mediation hid it from them, or allowed them to deny it. We can conceptualize the process that led us to the present impasse as follows.

There have always been many different legal modes of mediation, many forms of legal reasoning, many categorical schemes. Many modes coexist in a given period; different modes dominate from period to period. The single constant has been the gradual accretion of *criticisms* of each of the modes of mediation. The process of criticism has had two simultaneous tendencies: to reduce the multiplicity of modes to a smaller and smaller number, and to undermine the efficacy of the survivors in the very process of demonstrating their generality.

The participants did not *experience* this process as one of descent into contradiction. Indeed, they experienced the activity of discrediting most modes of mediation while developing the survivors into more and more powerful, general, and pervasive mechanisms for ordering the legal universe as enormously fulfilling. It was unimaginable to them that the very process of abstraction that made generalization possible would lead *us* ultimately to lose the ability to deny the contradiction.

I will use the term liberalism to describe the mode of mediation or denial that gradually killed off its rivals, before it finally succumbed to the problems it was designed to solve. Liberalism was initially a revolutionary mode not of *legal* thought, but of

thinking about politics.<sup>8</sup> It became, through works like Blackstone's *Commentaries*, a mode of legal thought as well. The history of legal thought in our culture is the history of the emergence of this legal version of the liberal mode, its progressive abstraction and generalization through the 19th century until it structured all legal problems, and its final disintegration in the early 20th century.

I will give a series of definitions or descriptions of liberalism, at various levels of abstraction, as the need arises in the discussion of the *Commentaries*. For the moment, I hope it is enough to define it very roughly in terms of a splitting of the universe of others into two radically opposed imaginary entities. One of these is "civil society," a realm of free interaction between private individuals who are unthreatening to one another because the other entity, "the state," forces them to respect one another's rights. In civil society, others are available for good fusion as private individual respecters of rights; through the state, they are available for good fusion as participants in the collective experience of enforcing rights. A person who lives the liberal mode can effectively deny the fundamental contradiction.

### *The Apologetic Aspect of Legal Thought*

Such a hypothesis about the history of the fundamental contradiction can provide us with a framework for the investigation of a particular work, such as Blackstone's *Commentaries*. But there is more to the enterprise of interpreting legal thought than the history of mechanisms of denial or mediation. Denial or mediation is not necessarily *apologetic*. The element of apology comes in because legal thought denies or mediates with a bias toward the existing social and economic order. It asserts that we have overcome the fundamental contradiction through our existing practices. Or that we can achieve that blissful state through minor adjustments of a legal regime that is basically sound, and needs only a little tinkering to make it perfect. Or that there are many and serious flaws in the existing order that we can remedy by bringing our tawdry practice into line at last with our noble (non-contradictory) ideals.

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8. T. HOBBS, *LEVIATHAN* (Oxford ed. 1957); J. LOCKE, *TWO TREATISES OF GOVERNMENT* (P. Laslett ed. 1960); see C. B. MACPHERSON, *THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM: HOBBS TO LOCKE* (1962).

It is important to keep clearly in mind the lack of necessary connection between the task of mediation and the apologetic enterprise. For example, a lot of "revolutionary Marxist theory" consists of the dogmatic denial of our contradictory feelings combined with violent denunciation of the status quo.<sup>9</sup> Seventeenth century English liberal political theory (Locke, Harrington, the Levelers) was a mode of mediation or denial, but it was also revolutionary. It is simply wrong to insist that because these bodies of thought are or once were radical rather than apologetic, they must necessarily avoid the pitfalls of denial. By contrast, the "tragic view of life" espoused by the leading critics of modernist culture claims to *accept* contradiction. It is nonetheless apologetic for all of that.<sup>10</sup>

### *The Connection Between Mediation and Apology*

A complete account of legal thought would *explain* the contingent but historically determinate association between liberal legalism as denial and liberal legalism as apology. It would get at the merger of the two intentions in the experience of legal thought itself. I would like to do this, but it does not seem possible to me, at least for the moment. For the moment, I am content with some rather vague slogans. The people doing legal thought have always been members of a ruling class. Implicit loyalty oaths have always been a condition of admission to the inner circles of legality. The enterprise of merely understanding the legal order is not one likely to be taken up by a person radically opposed to the status quo. Opposition to the status quo does not easily survive the kind of identification with the legal system that seems to be a psychological precondition for really understanding it.

Instead of trying to turn these ideas into a theory connecting mediation with apology, I intend to sail a more modest tack. I will show, first, how Blackstone's mode of reasoning and his categorical structures simultaneously mediate and legitimate, that is, how they become intelligible when seen as the products of mediating and legitimating intentions.

Second, I will show that we can understand the evolution of the specifically liberal mode of mediation as a consequence of attempts by people like Blackstone to use it to legitimate institutions that seem at first blush inconsistent with it. In order to assimilate

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9. See generally K. KORSCH, *supra* note 1.

10. E.g., E. L. TRILLING, *SINCERITY AND AUTHENTICITY* (1971). See generally G. LUKACS, *REALISM IN OUR TIME* (J. Mander & N. Mander trans. 1971).

existing English legal practices to the liberal scheme of justification, he had both to reinterpret the institutions *and* to abstract and generalize the liberal categories. In the process, the categories became more powerful. Legal thought became both more highly integrated *and* more vulnerable should the liberal mode lose its power of mediation.

### *Contrast with Other Methodologies*

It may be helpful in understanding my method if I try to draw a sharp contrast between it and the two alternatives that dominate contemporary legal historiography. The first alternative is the natural law approach practiced in most law school classrooms. It consists of analyzing the rationale of a decision to see if it "makes sense." If it does, we move on to the next. If it does not, we attempt to formulate an alternative rationale that satisfies us of the rationality and justice of the outcome. If we can construct no such rationale, we conclude that the decision was wrong, propose a different outcome, and explain why it would be better. This method attempts to use the analysis of past cases to advance the enterprise of discovering the requirements of justice in particular social circumstances.

My method is like the natural law method in that it requires the analysis of the coherence of judicial explanations of outcomes. It uses exactly the same critical techniques as the natural lawyers. But the goal is neither an alternative rationale nor a criticism of the outcome. It is to discover not what should have been done, but, first, the apologetic motive that the formal rationale was designed to disguise, and, second, the contribution of the reasoning process to the creation and maintenance of the liberal mode of mediation. Since the apologetic motive is one the judges could not admit and still retain their legitimacy, the analysis makes no direct contribution to the discovery and elaboration of principles of justice. The most it can do is put us on guard against implications of the rationalizing process that would otherwise have remained unconscious.

The second alternative method is that of instrumental or interest analysis, and it is common to most academic Marxist and liberal historians. The goal of instrumental analysis is to show that the conscious or unconscious motive of the judge was to further some particular interest, either of the judge himself or of a group with whom he identified. The point about interests is that they are

selfish, and that they need no further explanation. For example, once it is clear that the purpose of the 19th century rule of *caveat emptor* was to favor the merchant/capitalist class against the masses of agriculturalists and consumers, the instrumentalist rests his case. The most conclusive evidence of motive, in his view, consists of effects of decisions on the interests of social groups, with the character of the interests affected treated as largely self-evident to a person with a cynical view of human nature. The instrumentalist treats formal rationales of decisions as largely obfuscatory, except when they inadvertently or naively refer to selfish aims.

My method resembles instrumentalism in that it is concerned with hidden motives that the judges themselves would treat as illegitimate if forced to confront them. But the motives that interest me are those that lie behind the forms of legal reasoning and categorization, rather than those that animate the choice between plaintiffs and defendants acting as stand-ins for social classes. This is not to say that the latter kind of motives do not exist—it is their very obviousness that distracts us from the deeper patterns I want to elucidate. What I am after is the logic of obfuscation, rather than the struggle of conflicting interests that gives it energy.

The motives that guide choices among patterns of rationalization are both less conscious and less particular than those on which the instrumentalists focus. They have to do with maintaining and legitimating the general (but biased) ground rules of class struggle rather than with outcomes day to day or even decade to decade. By looking closely at them, I hope to overcome what seems to me a crippling instrumentalist error: that of attributing so much importance to particular outcomes within the framework that the framework itself becomes invisible. The blanking out of the framework turns instrumental critical thought itself into a form of apology, because it denies the *current reality* in our own thinking of the contradictions it is happy to recognize in particular past decisions.

### *Some Disclaimers*

My focus on interpreting the larger framework as simultaneous mediation and legitimation means that what I have to say is descriptive, and descriptive only of thought. It means ignoring the question of what brings a legal consciousness into being, what causes it to change, and what effect it has on the actions of those who live it. My only justification for these omissions is that we need

to understand far more than we now do about the content and the internal structure of legal thought before we can hope to link it in any convincing way to other aspects of social, political or economic life. There are dangers to deferring the task, but I think them well worth risking.

Given this limitation of focus, it would be a delusion to think that the study of the history and prehistory of our contradictory feelings can resolve the contradiction, provide a basis for political action, or even help us in the task of formulating and reformulating our goal. Even if we *could* resolve the contradiction at the level of theory, we would still be subject to its influence in practice. The examples of Stalinism and fascism have a force on its behalf greater than that of any body of abstract speculations. The same is true of the commonplace that existing bureaucracies, ostensibly under popular control, develop and pursue interests incompatible with their public purposes. And it is important to remember that, even on the level of thought, legal ideology is only a small, though not insignificant, part of the total complex of ideas that seem to render egalitarian socialism a utopia.

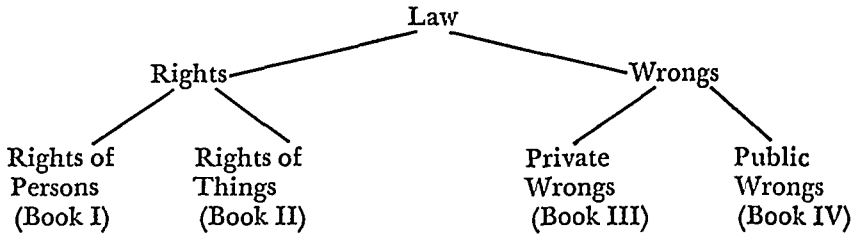
The enterprise thus appears twice defeated before it is begun: we cannot resolve the contradiction within legal theory, and even if we could, the accomplishment would be of limited practical importance. Yet it may nonetheless be worth undertaking. It is true that the categories of individual and collective, and freedom and power, represent an insuperable contradiction within our experience. But it is also true that we embrace, generalize and intensify the contradiction by accepting it uncritically as part of the nature of things. To *some* extent, we are the victims of our own reification rather than of our historical circumstances. To this extent, "thinking makes it so." The task of criticism is to demystify our thinking by confronting us with the fact that the contradiction is a historical artifact. It is no more immortal than is the society that created and sustains it. Understanding this is not salvation, but it is a help.

## PART TWO

### AN INTERPRETATION OF BLACKSTONE'S DISTINCTION BETWEEN RIGHTS AND WRONGS

The purpose of this part is to interpret Blackstone's distinc-

tion between rights and wrongs. This distinction is his most basic one, dividing the *Commentaries* into two parts as follows:



As soon as one gets beyond the odd terminology, some elements of this plan of organization are familiar to the modern reader. The distinction between private and public wrongs is that between civil and criminal law. The "rights of persons" consists *mainly* of rules about public institutions, such as the monarchy, parliament and the established church, while the "rights of things" includes *most* of the substantive rules of property, contract and tort.

Yet the more one tries to match Blackstone's categories with those currently in use, the stranger they seem. The distinctions that seem primary to us are public law vs. private, crime vs. civil wrong, contract vs. tort, substance vs. procedure, right vs. remedy, and so forth. All of these were present in Blackstone, but he subordinated them to his larger right/wrong and person/thing distinctions, and did not follow them consistently when he used them. While much of contracts was in the law of things, some of it was in the law of persons. He treated some of the rules about the organization of governmental institutions in the law of rights and some in the law of wrongs. And so forth.

My interpretation of this procedure has three sections. The first explains the nature of Blackstone's distinction, and shows that it corresponds neither to our dichotomy between right and remedy nor to our dichotomy between substance and procedure. In the second section, I will show how the right/wrong distinction functioned to legitimate the 18th century legal system. Blackstone used the distinction to demonstrate that the system viewed as a whole was rational, natural and free. In the third section, I will show that Blackstone's organizational scheme *also* functioned as a mediator between collective power and individual freedom, permitting him to deny the fundamental contradiction of the two. Blackstone's thesis about rights and wrongs is a prototype of the

modern liberal argument that existing exercises of state force are legitimate because (and only to the extent that) they protect individual rights.

### A. *What Needs Explaining*

Blackstone introduced the right/wrong distinction as follows:

Now, as municipal law is a rule of civil conduct, commanding what is right, and prohibiting what is wrong . . . it follows that the primary and principal object of the law are RIGHTS and WRONGS. In the prosecution, therefore, of the commentaries, I shall follow this very simple and obvious division; and shall, in the first place, consider the *rights* that are commanded, and secondly the *wrongs* that are forbidden, by the laws of England.<sup>11</sup>

One might suppose from the beginning of the passage that he meant that some rules command what is "right," while other rules forbid what is "wrong." But that is not at all his meaning. *Every* rule does both simultaneously: it specifies some "right" and then forbids the "wrong" of infringing it. The elision of "doing right" into "respecting rights" is typical of Blackstone, but he was perfectly clear that law was not concerned with morality or right conduct in general, but with a narrower class:

[W]ith regard to the absolute *duties*, which man is bound to perform considered as a mere individual, it is not to be expected that any human municipal law should at all explain or enforce them. For the end and intent of such laws being only to regulate the behaviour of mankind, as they are members of society, and stand in various relations to each other, they have consequently no concern with any other but social or relative duties. Let a man therefore be ever so abandoned in his principles, or vicious in his practice, provided . . . [he] keeps his wickedness to himself, and does not offend against the rules of public decency, he is out of the reach of human laws. [I-123-24]

Blackstone's own analytic table of rights is set forth below. It is worth studying carefully at this point, since we will recur to it over and over again in the course of the discussion.

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11. 1 W. BLACKSTONE, COMMENTARIES \*122. Subsequent page references will be bracketed in text and cited by volume and page number, thus: [I-122]. All page references are to the star page. Spelling, punctuation, and wording follow the version of the Christian edition edited by "a member of the New York Bar," published by Lippincott, Grambo & Co. in Philadelphia, 1855. Blackstone's footnotes are omitted throughout.



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### 1. *The Relation of Rights to Wrongs*

In the law of rights thus constituted, we find three different kinds of exposition, corresponding roughly to absolute rights of persons, relative rights of persons, and rights of things. In the first, Blackstone declared the existence of a right, in our current sense of a rather abstract "legally protected interest." He then gave a few examples of the implications of the abstractions: because there was a right of freedom of locomotion, there was a right not to be imprisoned without just cause, either by a private person or by a public officer. [I-134-37]

In the second mode, Blackstone described a legally recognized relationship, such as sovereign and subject, pastor and parishioner, or husband and wife. Taken as a group, this collection of roles defined the social structure of 18th century England. With respect to each, Blackstone specified some or all of the following:

- (a) special formalities governing entry into the relationship (*e.g.* official solemnization of marriage);
- (b) limitations of legal capacity "flowing" from the relationship (wife cannot make binding contract);
- (c) special duties to others within the relationship (as of husband to wife) whether subject to contractual modification or not;
- (d) special duties to or rights against strangers flowing from the relationship (husband must pay debts of wife for necessities; husband can bring action against stranger for alienation of affection);
- (e) limitations on withdrawal from the relationship (divorce, etc.).

A procedure of this kind is familiar to us from family law discussions of the law of marriage, of parent and child, and of guardian and ward. But it is important to keep in mind that Blackstone applied this treatment to a series of subjects that we now regard very differently. Indeed, the content and structure of the "relative rights" of persons is decidedly peculiar from our point of view.

In his third mode, Blackstone identified the types of interests that a person could have with respect to various kinds of real and

fictional "things," as, for example, a fee simple interest or a contingent remainder, along with the rights and duties this interest implied with respect to other people. He then set forth the various ways in which one might acquire the particular interest in question. For example, one might acquire title to real property by escheat, occupancy, prescription, forfeiture or alienation.

While Blackstone saw all of these as different kinds of rights, he was aware that what he was doing could also be described as cataloguing duties. Indeed, given that right and duty were for him strictly correlatives of one another, he thought it "more clear and easy to consider many of them as duties required from, rather than as rights belonging to, particular persons." [I-123] Nonetheless, the choice to organize the basic structure in terms of rights was not a random one. It would be closer to the truth to say it was "over-determined," meaning that it responded to a whole set of aspects of his situation.

I am going to argue that it had a particular apologetic significance. But I do not mean to underestimate the other code-termining factors: Hale had used a similar scheme in a short treatise published posthumously in 1703;<sup>12</sup> the "rights of Englishmen" was an important political slogan; Blackstone was familiar with the Roman law legal categories of *jus personarum* and *jus rerum* [I-122]; and 17th and 18th century political thought had developed "natural rights" as its central concept.<sup>13</sup> What was unusual about Blackstone was not that he put rights in the foreground, but the way he related them to "wrongs."

The description of rights in Books I and II was only preliminary. The reason for this was that one couldn't fully understand rights until one got to the law of wrongs, whose purpose was to specify what happened when a person violated a legally protected interest. Given this purpose, and the familiar initial distinction between civil and criminal responses to violations, Blackstone's organization of the law of wrongs was relatively straightforward. His table of private or civil injuries is on the following page.

The important things to note about this table are the following. First, the law of private wrongs contained the rules defining

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12. M. HALE, *THE ANALYSIS OF THE LAW: BEING A SCHEME OR ABSTRACT OF THE SEVERAL TITLES AND PARTITIONS OF THE LAW OF ENGLAND, DIGESTED INTO METHOD* (3d ed. London 1739).

13. See note 8 *supra*.

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the jurisdictions of the various courts and the rules of civil procedure, or pleading. Second, it contained a long section on "the respective remedies for injuries affecting" the interests Blackstone had described in the first two books on the "law of rights." Third, the organization of this part on remedies mirrored that of Books I and II. Blackstone meant Book III to "follow the same method that was pursued with regard to the distribution of rights: for as . . . [wrongs] are nothing else but an infringement or breach of those rights, which we have before laid down and explained, it will follow that this negative system, of *wrongs*, must correspond and tally with the former positive system, of *rights*." [III-119. See also III-2] Wrongful invasions of the absolute rights of persons were followed by invasions of their relative rights, and then by injuries to property.<sup>13.1</sup>

By contrast, the breakdown of *public* wrongs deviated rather far from the organization of the law of rights (see table on page 230).

Once again, there were long sections devoted to the jurisdiction of the criminal courts and to criminal procedure. Corresponding to the "respective remedies" section of Book III on private wrongs, there was a section on "the several crimes (with their several punishments) more peculiarly offending" against various legally protected interests. The analysis of crimes abandoned the earlier tripartite scheme of absolute rights of persons, relative rights of persons, and rights of things. In its place, Blackstone offered a hierarchical arrangement: offenses against God and religion; against the law of nations; against the king and government; against the commonwealth; and against individuals. Nonetheless, the underlying idea remained the same: a list of interests protected served to organize a list of offenses and responses to offenses.

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13.1 The correspondence was not perfect, however. Blackstone treated injuries to the "rights of the crown" in a separate section, rather than under "relative rights" of persons, where he would have put them if he had followed out his own scheme consistently. His explanation was that the "remedy in such cases is generally of a peculiar and eccentric nature." [III-116] Moreover, the sections on the ecclesiastical and military courts dealt with some injuries arising from the relationship of husband and wife and from the statuses of clergyman and soldier, which ought to have fallen under the relative rights of persons.

## CONTENTS OF THE ANALYSIS OF BOOK IV.

### PUBLIC WRONGS.

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11. Execution .....	XXXII.

## 2. *The Oddness of Blackstone's Categorical Scheme*

Assume for the moment that Blackstone's distinction between rights and wrongs corresponds to ours between rights and remedies *and* to ours between substance and procedure. Then the only odd aspect of his scheme was that he had to consider each substantive right three times. He defined it in Book I or Book II, he specified civil remedies for its infringement in Book III, and the punishment for its criminal invasion in Book IV. It would seem much more natural to have appended at least the civil remedies to the substantive discussion, and then segregated procedure and perhaps criminal law for separate treatment.

Blackstone could not have proceeded in this way, given his underlying intention. The reason for this is that civil remedies *per se* occupied only a miniscule part of the law of civil wrongs. Indeed, there were only two sentences in all the *Commentaries* treating what we understand by the term "remedies" when we use it in opposition to the term "rights":

Now, since all wrongs may be considered as merely a privation of right, the plain natural remedy for every species of wrong is the being put in possession of that right, whereof the party injured is deprived. This may either be effected by a specific delivery or restoration of the subject-matter in dispute to the legal owner . . . or where that is not a possible, or at least not an adequate remedy, by making the sufferer a pecuniary satisfaction in damages . . . .  
[III-116]

Blackstone paid little attention to remedies in the abstract because there was no *law* of remedies in the abstract. At the time he wrote, the particular remedy available for a given infringement of a right was understood to be a consequence or implication of the choice of a *writ* by which to commence one's legal action against the offender. As Blackstone said in the sentence following the one last quoted: "[t]he instruments whereby this remedy is obtained (which are sometimes considered in the light of the remedy itself) are a diversity of suits and actions, which are defined by the mirror to be 'the lawful demand of one's right'. . . ." [*Id.*]

A writ or "form of action" was in itself neither a right nor a remedy. One *used* a writ to secure from the courts a remedy for



the invasion of a right. The requirement that every legal action take the course of "suing out" one of these writs was the defining characteristic of the medieval English legal system. In that system, the royal courts had a limited jurisdiction, the presumption being that most disputes would be handled by the network of feudal courts belonging to the various lords. To get into the royal courts, it was necessary to show that the injury suffered was one of those regarded as worthy of the attention of the central government. The royal judges required the suitor to specify by the choice of a writ which of the list of such injuries he was alleging, and they threw the case out of court if it turned out that the actual injury was not of that type.

The system of royal justice gradually expanded until eventually it became a substantively complete body of rules, covering the whole range of civil and criminal injuries. In this process, which was not completed until the 19th century, the local courts outside the royal system gradually faded into insignificance, but the writ system that defined royal jurisdiction did not. Instead of adopting one of the conceptual schemes then available for understanding the legal system as a whole, the English expanded, contorted or fictionalized the original forms of action, and plugged the remaining holes with a separate national system of "courts of equity." The complete body of substantive rules was subsumed one way or another under the original categories. Thus the learning of writs *was* English law.<sup>14</sup>

It would therefore have been possible for Blackstone to organize the *Commentaries* around the forms of action. He might have specified all the types of injuries for which one might have redress in debt, detinue, covenant, trover, trespass, trespass on the case, and so forth, along with the special procedural rules that governed each particular action. When he had finished the list, he would have finished with the law. This was the method of the medieval commentators, of the "abridgements," and of English and American aids to practice (called *nisi prius* books).<sup>15</sup>

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14. See F. MAITLAND, *EQUITY AND THE FORMS OF ACTION AT COMMON LAW* (1909); S. MILSOM, *HISTORICAL FOUNDATIONS OF THE COMMON LAW* (1969).

15. See the discussions of Glanvill and Bracton in I F. POLLOCK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW: BEFORE THE TIME OF EDWARD I* (2d ed. 1968); N. DANE, *A GENERAL ABRIDGEMENT AND DIGEST OF AMERICAN LAW* (1823); I. ESPINASSE, *DIGEST OF THE LAW OF ACTIONS AT NISI PRIUS* (1789).

The alternative that was adopted in the 19th century was to discard the idea of using the forms of action as a conceptual scheme or organizing device. Until they were actually abolished, it was still necessary to know what writ to use for each of the injuries that might lead to a remedy. But systematic writers on law and jurisprudence analyzed legal rules wholly through the categories of a "rational" scheme of legal rights or duties that bore very little if any formal relation to the medieval ordering. They spoke of "causes" rather than "forms" of action. The requirements for maintaining a cause of action were implicit in the nature of the substantive right asserted. Thus an offer and acceptance were necessary in a contract action because it *was* a contract action. Whether one sued out a writ of trover, detinue or assumpsit was of merely practical or historical importance. The author might or might not append pleading instructions at the end of the substantive discussion, but if he did, they had no theoretical significance.<sup>16</sup>

Blackstone's approach lay somewhere in between the medieval and modern solutions to the organizational problem. The basic structure through which he analyzed substantive rules was a theory of rights. He never presented the writ system as a whole with its own logic. For example, there was no listing anywhere in the *Commentaries* of all the injuries remedied through an action of trespass on the case. The reader had to construct his own list by assembling the separate discussions in the sections on wrongs to absolute rights, to relative rights and to rights over things. Yet Blackstone was nonetheless nothing like a 19th century analytical jurist: he refused to carry out completely the program of subordinating the forms of action to his theory of rights.

Book III, on private wrongs, was devoted not to distinguishing specific performance from damages, but to presenting a reorganized version of the writ system: "herein I shall, first, define the several injuries cognizable by the courts of common law, with the respective remedies applicable to each particular injury: and shall, secondly, describe the method of pursuing and obtaining these remedies in the several courts." [III-115. *See also* IV-376] For example, he

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16. *See, e.g.,* W. HOLLAND, *ELEMENTS OF JURISPRUDENCE* (1880); T. PARSONS, *THE LAW OF CONTRACTS* (1855).

placed the law of contracts, according to a rational, nontechnical scheme, in the law of personal property. In the initial discussion of contract as a *right*, he presented the elements of the *cause* of action as a function of the definition of contract as agreement. But in the section on *wrongs*, he further subdivided the contract idea into situations appropriate to the forms of action of debt, covenant, indebitatus assumpsit, and so forth. We cannot fully understand what contracts were enforceable, or to what extent, without consulting this latter treatment.

What this means is that we can reduce the right/wrong distinction neither to that between substance and procedure nor to that between right and remedy. Blackstone divided what we would call substance into two compartments, one containing a "rational" exposition of causes of action derived from rights, and the other containing a further subdivision of the cause of action according to the traditional pleading categories. This second, "technical" discussion was grouped with the material on jurisdiction and pleading to form the law of wrongs.

B. *The Right/Wrong Distinction as a Legitimator of the Status Quo*

Blackstone had to construct a substantive law of wrongs because it was his intention to vindicate the common law against the charge that it was inconsistent with the enlightened political thought of his day, and especially with emerging liberalism. Here we are concerned with the liberal critique of judicial institutions, that is, of the system of courts with different jurisdictions, the writ system, and the system of common law pleading. This was only a part, the procedural rather than the substantive part, of the total program.

The liberal argument was that the exercise of state power was legitimate only to the extent that it: (a) facilitated intercourse between individuals in the private sphere of civil society by protecting their rights against one another; or (b) protected those same individual rights against attempts by the state (especially the executive) to establish itself as a private power center. From this position there flowed a specific critique of English judicial institutions, namely that they were irrational and unnatural. In particular, the writ system, common law pleading, and the distinction

between law and equity were arbitrary, hyper-technical, feudal remnants incapable of performing the functions allotted to the legal system in a modern political society.<sup>17</sup>

Blackstone himself acknowledged the existence of these criticisms, and their surface plausibility. There were "disjointed parts which still form a considerable branch of the modern law." [III-196] There was the "difficulty which attends" the study of the forms of action, arising "from their great variety, which is apt at our first acquaintance to breed a confusion of ideas, and a kind of distraction in the memory: a difficulty not a little increased by the very immethodical arrangement, in which they are delivered to us by our ancient writers, and the numerous terms of art in which the language of our ancestors had obscured them." [III-265-66. *See also* III-317-22] To the untutored eye, "our present system of remedial jurisprudence (in respect of landed property) would appear the most intricate and unnatural that ever was adopted by a free and enlightened people." [III-267]

With respect to the system of pleading, Blackstone had to admit that there were "a few unworthy professors: who study the science of chicane and sophistry rather than of truth and justice; and who, to gratify the spleen, the dishonesty, and wilfulness of their clients, may endeavour to screen the guilty, by an unwarrantable use of those means which were intended to protect the innocent." [III-423. *See also* III-306] Blackstone went so far as to cast himself in the role of the underdog combatting the established wisdom:

The uncertainty of legal proceedings is a notion so generally adopted, and has so long been the standing theme of wit and good humor, that he who should attempt to refute it would be looked upon as a man, who was either incapable of discernment himself, or else meant to impose upon others. . . .

[This uncertainty] hath sometimes been said to owe its original to the number of our municipal constitutions, and the multitude of our judicial decisions; which occasion, it is alleged, abundance of rules that militate and thwart with each other, as the sentiments or caprice of successive legislatures and judges have happened to vary. [III-325]

Blackstone might have responded to these attacks by denying the validity of the liberal premises, or of the inferences about judi-

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17. *See* R. ROBSON, *THE ATTORNEY IN EIGHTEENTH CENTURY ENGLAND* (1959).

cial institutions that the liberals drew from them. But he did neither. His approach was to accept both the premises and the inferences, and then to argue that the critics simply misunderstood the system. He aimed to convert the opposition by painting a picture of English law that made it appear to correspond almost exactly to what they wanted it to be.

An important aspect of this strategy was to shift the blame for those parts of the legal system he felt it impossible to defend. Blackstone did this through a historical argument that was a commonplace of his time.<sup>18</sup> The existing defects of the system, he explained, could all be traced either to the Normans, or to the process of legislative reform that the Normans had made necessary. To make this position plausible, he posited the existence of a golden age—that of the Saxon constitution before the Conquest. English law had then combined the simplicity necessary to the effective regulation and facilitation of the affairs of private parties with the “strictness” necessary to preserve civil liberty against state encroachments.

The Normans had “engraft[ed] on all landed estates . . . the fiction of feudal tenure, which drew after it a numerous and oppressive train of servile fruits and appendages.” [IV-418] Aside from the clergy, the great lords, and a small commercial class, the whole population “were villeins or bondsmen,” and “groaned” under an “absolute slavery.” [IV-420, 418] But the Normans were also prone to “chicanes and subtilities.” “Hence the law . . . which (being intended for universal reception) ought to be a plain rule of action, became a science of the greatest intricacy . . .” [IV-417] Against this background, Blackstone put forward a highly paradoxical defense of the law of wrongs, with all its technicality:

And, to say the truth, these scholastic reformers have transmitted their dialectic and finesses to posterity, so interwoven in the body of our legal polity, that they cannot now be taken out without a manifest injury to the substance. Statute after statute has in later times been made, to pare off these troublesome excrescences, and restore the common law to its pristine simplicity and vigour; and the endeavour has greatly succeeded: but still the scars are deep and visible; and the liberality of our modern courts of justice is frequently obliged to have recourse to unaccountable fictions and circuities, in order to recover that equitable and substantial justice,

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18. See J. Pocock, *THE ANCIENT CONSTITUTION AND THE FEUDAL LAW* (1957).

- which for a long time was totally buried under the narrow rules and fanciful niceties of metaphysical and Norman jurisprudence. [IV-417-18]

Insomuch as problems still remained, Blackstone baldly attributed them to the inadequacies of the *legislative* part of the reform movement, rather than to the judges or to the common law process:

The mischiefs that have arisen to the public from inconsiderate alterations in our laws, are too obvious to be called in question; and how far they have been owing to the defective education of our senators, is a point well worthy the public attention. . . . For, to say the truth, almost all the perplexed questions, almost all the niceties, intricacies, and delays, (which have sometimes disgraced the English, as well as other courts of justice,) owe their original not to the common law itself, but to innovations that have been made in it by acts of parliament . . . . [I-10. See also I-70; II-379; IV-443]

The consistency of these two positions—that it was all the fault of the Normans and that it was all the fault of Parliament—is less important than that each displaced the blame from the system itself. But Blackstone aimed to do a good deal more than that. His ultimate intention was to legitimate both judicial institutions and the substantive law they enforced. Even with the blame shifted, he aimed to make few concessions to the critics. To this end, he developed four distinct strands of argument, each of which showed that the administration of justice, despite the “scars” and “mischiefs,” was quite close to perfect in its implementation of the principles of the English social order.

First, the writ system functioned in a rational, scientific fashion to provide a remedy for each of the rights that together defined the social order. Second, the writ system and the rules of pleading had acquired, by an evolutionary process intelligible to the initiate, a modern and commercial character adapted to the needs of civil society. Third, the remaining elements of “strictness” and “technicality” were necessary and even desirable as a restraint on state power over the individual. Fourth, all the judges in all the different courts pursued a single, highly objective judicial method, so that the potential for arbitrariness in the multiplicity of jurisdictions was merely apparent rather than real.

### 1. *For Every Right a Remedy*

From the first page of his Introduction, Blackstone continuously asserted that law was a "science" [I-4, 22, 23, 27, 33, 34, 36; II-2] and that its foundations were "wide and rational." [III-55; I-425] Of course, he used the word "science" in the manner of his time. Late 19th and 20th century American legal thinkers instinctively equate science with objectivity, and contrast it with "subjective" forms of thought. When they call law scientific they mean to contrast it with legislation, which is supposedly merely "political."<sup>19</sup> These are important slogans in our perennial conflicts over judicial activism. But they are only obliquely related to Blackstone's notion of science.

He meant by it neither a strictly deductive nor a strictly inductive body of knowledge, but rather one in which particulars were rationally related to first principles. He contrasted science not with subjectivity or politics, but with the practical, the everyday mode of understanding the world. Thus a lawyer without a university education, trained under the apprenticeship system, must be "uninstructed in the elements and first principles upon which the rule of practice is founded." [I-32] "[H]e must never aspire to form, and seldom expect to comprehend, any arguments drawn, *a priori*, from the spirit of the laws and the natural foundations of justice." [Id.] "It is well if the mass of mankind will obey the laws when made, without scrutinizing too nicely into the reason for making them. But, when law is to be considered not only as a matter of practice, but also as a rational science, it cannot be improper or useless to examine more deeply the rudiments and grounds of these positive constitutions of society." [II-2]

Law was that "science, which distinguishes the criterions of right and wrong; which teaches to establish the one, and prevent, punish, or redress the other." [I-27] Again, we must beware Blackstone's tendency to elide law as "the principal and most perfect branch of ethics" [Id.] with law as the protection of socially recognized interests. What he intended was to show that legal science could trace each of the enormously varied particular rules of the administration of justice to the first principle of respect for the rights of others. Books III and IV of the *Commentaries*—the law

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19. See generally E. PURCELL, *THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM AND THE PROBLEM OF VALUE* (1973).

of wrongs—preserved the unitary character of the law of jurisdiction, of the forms of action, and of pleading, so that Blackstone could show the common law to be fully consistent with the contemporary definitions of rights he elaborated in Books I and II.

Given this intention, it is easy to understand why the maxim *ubi jus, ibi remedium* (for every right a remedy) dominated Blackstone's law of wrongs. He tended to state it formally at the beginning of each important subdivision. The chapter "Of Courts in General" has it that, except in cases where the remedy is self-help, "where there is a legal right, there is also a legal remedy, by suit or action at law, whenever that right is invaded." [III-23] At the beginning of the discussion of the common law courts, he asserted that "all possible injuries whatsoever, that did not fall within the exclusive cognizance of either the ecclesiastical, military, or maritime tribunals, are for that very reason within the cognizance of the common law courts of justice. For it is a settled and invariable principle in the laws of England, that every right when withheld must have a remedy, and every injury its proper redress." [III-109. See also III-86, 183-84, 266, 422]

The action on the case was the single most important piece of evidence for this claim:<sup>20</sup>

For though in general there are methods prescribed, and forms of action previously settled, for redressing those wrongs, which most usually occur, and in which the very act itself is immediately prejudicial or injurious to the plaintiff's person or property, as battery, non-payment of debts, detaining one's goods, or the like; yet where any special consequential damage arises, which could not be foreseen and provided for in the ordinary course of justice, the party injured is allowed, both by common law and the statute of Westm. 2.c. 24; to bring a special action on his own case, by a writ formed according to the peculiar circumstances of his own particular grievance. For wherever the common law gives a right or prohibits an injury, it also gives a remedy by action; . . . and, therefore, wherever a new injury is done, a new method of remedy must be pursued. [III-122-23]

But the main use of the principle was not to develop or justify new remedies, but to defuse the liberal criticism that the law was hypertechnical:

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20. Blackstone's notion of the theory of the action was wrong as a historical matter, but that has no importance for the point made in the text. See S. MILSOM, *supra* note 14, at 256-71.



Terms of art there will unavoidably be in all sciences . . . . But I trust that this difficulty, however great it may appear at first view, will shrink to nothing upon a nearer and more frequent approach. . . . And, such as it is, it arises principally from the excellence of our English laws; which adapt their redress exactly to the circumstances of the injury, and do not furnish one and the same action for different wrongs, which are impossible to be brought within one and the same description: whereby every man knows what satisfaction he is entitled to expect from the courts of justice, and as little as possible is left in the breast of the judges, whom the law appoints to administer and not to prescribe the remedy. [III-266. See also III-50-51]

There is a good deal of ambiguity in all of this. We are familiar with *ubi jus, ibi remedium*, but have learned to see it as containing a snare. To understand Blackstone, we need first to know how he stood on the issue of whether it is *meaningful* to speak of a "right" apart from the remedies the state makes available against those who violate it. If a right can have no existence separate from remedies, then *ubi jus, ibi remedium* is a misleading formulation of a tautology. It should read: to the extent that there are remedies, there are rights.

. It is perfectly clear that this was not Blackstone's view. Not only did he believe in the meaningfulness of the idea of rights, but some part at least of his apologetic point was that in fact the law of England had provided remedies for their redress. He intended not a tautology, but praise for the way in which the reality of remedies had been worked out so as to respond to the reality of rights. It is probably true, but irrelevant to this point, that in *practice* he constructed his catalogue of rights by working backwards from the statutes, judicial decisions and political practices actually in force. Such is the nature of apology. It would have been ineffective apology if he had not reversed the order once the constructive task was finished.

But there is a second, no less troublesome, ambiguity to his formulation. In some versions of the maxim, Blackstone tells us that where there is a "*legal* right," or where "*the common law* gives a right," there is a remedy. At other times, remedies flow from the mere fact of "injury," or "wrong," without the epithet "legal." Is he telling us that the excellence of the legal system lies merely in the fact that having recognized some set of legal rights, it not surprisingly gives remedies to enforce them? Or is he telling us that the excellence of the legal system lies in its initial choice to

recognize, through the action of the common law judge, the rights it *ought* to recognize, and then, incidentally, to give legal remedies for their enforcement? In the first case, the excellence is, so to speak, administrative. In the second, it pertains to the substance of the system. In the first case, rights are sufficiently meaningful so that we can say that the remedial system does or does not protect them, but not so real as to exist without an act of will on someone's part. In the second, their existence is prior to legislative or judicial will, and the design of the remedial system merely reflects the pre-legal reality of rights.

There is no question that Blackstone meant to make the claim of administrative excellence. As to the second, substantive claim, he was ambivalent, and for good reason. The rights he catalogued in Books I and II were supposedly what explained the remedial system, that is, their existence justified the existence of the writ system, the rules of pleading and the jurisdictions of courts. If the rights were, in turn, justified by nothing but the opinions of the judges about what rights ought to be, then the system might be excellent in intention, but the judges would be subject to the charge of arbitrariness. On the other hand, if the rights were all specified by the will of a sovereign superior to the judges, the substance of the system might be radically unjust, for all the thoroughness with which rights once recognized were fitted out with judicial remedies.

Blackstone's solution had two parts. First, he affirmed the congruence of natural law and the law of England, so that there was never a need for the judge to choose between the two. He prepared the way with his famously ambiguous definition of municipal law as "a rule of civil conduct prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong." [I-44] On a much more specific level, "[t]he absolute rights of every Englishman . . . as they are founded on nature and reason, so they are coeval with our form of government. . . . [A]nd their fundamental articles have been from time to time asserted in parliament, as often as they were thought to be in danger." [I-127] Given this claim that the law of England, looked at as the will of Parliament, did in fact protect people's rights, Blackstone could, without apparent contradiction, affirm both the absolute lawmaking power of the sovereign *and* the absolutely binding character of pre-legal individual rights.

The *Commentaries* accordingly contain a number of classic statements of what we now call the positivist position on the nature of law. For example: "[I]t is requisite to the very essence of a law, that it be made by the supreme power. Sovereignty and legislature are indeed convertible terms; one cannot subsist without the other." [I-46] It was both the right and the duty of the sovereign to make the laws. [I-52] In order for law to perform its function, "it is first of all necessary that the boundaries of right and wrong be established and ascertained by law . . . . [I]t will follow of course that it is likewise the business of the law . . . to enforce these rights, and to restrain or redress these wrongs." [I-53] "The power and jurisdiction of parliament . . . is so transcendent and absolute, that it cannot be confined, either for causes or persons, within any bounds . . . . It hath sovereign and uncontrollable authority in the making . . . of laws, concerning matters of all possible denominations . . . this being the place where that absolute despotic power which must in all governments reside somewhere, is intrusted by the constitution of these kingdoms." [I-160]

On the other hand, Blackstone believed that there were laws of God and nature that were prior and superior to those of any particular state: "[The] law of nature, being coeval with mankind, and dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe . . . no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force, and all their authority, mediately or immediately, from this original." [I-41] "Those rights then which God and nature have established, and are therefore called natural rights, such as are life and liberty, need not the aid of human laws to be more effectually invested in every man than they are. . . . On the contrary, no human legislature has power to abridge or destroy them, unless the owner shall himself commit some act that amounts to a forfeiture." [I-54]

There are two things about this position that are likely to mislead the modern reader. First, it did not imply judicial review. The power of Parliament was indeed absolute *within the constitution*. The only sanction for a legislative violation of natural rights was revolutionary action of the people. Blackstone agreed, as he put it, "in theory" with Locke's notion that " 'there remains still in the people a supreme power to remove or alter the legislative, when they find the legislative act contrary to the trust reposed

in them.' " [I-161]<sup>21</sup> But this power was extra-legal, amounting to a dissolution of the constitution, the repeal of all existing laws, and return to the state of nature. "So long therefore as the English constitution lasts, we may venture to affirm, that the power of parliament is absolute and without control." [I-162]

Second, Blackstone had no intention of trying to show that all existing positive law could be traced to the law of God or of nature. It was true that with respect to the small number of *absolute* individual rights, "legislature . . . acts only . . . in subordination to the great lawgiver, transcribing and publishing his precepts." [I-54] It was nonetheless also true that the content of the law "depends not so much upon the law of revelation or of nature, as upon the wisdom and will of the legislator." [*Id.*] The explanation of the apparent inconsistency was that "things in themselves indifferent," unlike things governed by natural law, "become either right or wrong, just or unjust, duties or misdemeanors, according as the municipal legislator sees proper, for promoting the welfare of the society." [I-55]

From this legislative power over "things in themselves indifferent" flowed *most* of the actual rights that were vindicated through the law of wrongs, including all the relative rights of persons (defining public institutions like the monarchy, as well as the established church and family law) and the regulations of the acquisition and transfer of property contained in the Book on the "rights of things." [I-124-25] Blackstone justified all of these institutions in terms of the "convenience of civil society," rather than by reference to men's rights in the state of nature.

From all of this, it seems reasonable to conclude that "for every right a remedy" was more than merely a claim that the administration of justice faithfully executed whatever a superior will commanded. But it was *less* than a claim that the judges were empowered to devise a remedial institution whenever they perceived behavior they themselves thought wrongful. One of the things that made Blackstone's account of the administration of justice effective as apology was this very ambiguity. Because he believed in the reality and binding legal force of natural rights, he could in good conscience claim that there were remedies simply for "wrongs." But because he also believed that the law of England positivized natural rights as well as those based on convenience,

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21. Quoting J. LOCKE, *supra* note 8, at 385.

he could claim that there was no law without a sovereign power, so that the judge's action was essentially instrumental, rather than creative.

It was not enough, however, to segregate and then reconcile the system of rights and the system of remedies. Blackstone was eager to show that the writ system served rather than obstructed the two fundamental objectives of liberal law: the facilitation of voluntary private intercourse within civil society and the restraint of state power within its appropriate bounds. To this end, he developed throughout the *Commentaries* the notion that the common law had changed to meet the needs of a modern commercial society, but that it remained "strict" and "technical," and therefore apparently "inconvenient," where this was necessary to the preservation of essential civil liberties.

## 2. *The Theme of Evolution*

The paradigm of change was the replacement of the medieval forms of action for the recovery of real property by a modern system based on the much simpler action to recover personal property. Since the change had been accomplished by fiction, Blackstone was "unavoidably led to touch upon such obsolete and abstruse learning, as [lay] intermixed with, and [which] alone [could] explain the reason of, those parts of the law which are now more generally in use." [III-196] But once the student had mastered the system, he would be in a position to understand one of the central messages, and the central image of the *Commentaries*. In his concluding passage on the writ system, Blackstone summed it up with a literary intensity that is still a delight:

When therefore, by the gradual influence of foreign trade and domestic tranquility, the spirit of our military tenures began to decay, and at length the whole structure was removed, the judges quickly perceived that the forms and delays of the old feudal actions (guarded with their several outworks of essoins, vouchers, aid-prayers, and a hundred other formidable intrenchments) were ill-suited to that more simple and commercial mode of property which succeeded the former, and required a more speedy decision of right, to facilitate exchange and alienation. Yet they wisely avoided soliciting any great legislative revolution in the old established forms, which might have been productive of consequences more numerous and extensive than the most penetrating genius could foresee; but left them as they were, to languish in obscurity and oblivion, and endeavoured by a series of minute contrivances

to accommodate such personal actions, as were then in use, to all the most useful purposes of remedial justice: and where, through the dread of innovation, they hesitated at going so far as perhaps their good sense would have prompted them, they left an opening for the more liberal and enterprising judges, who have sat in our courts of equity, to shew them their error by supplying the omissions of the courts of law. And, since the new expedients have been refined by the practice of more than a century, and are sufficiently known and understood, they in general answer the purpose of doing speedy and substantial justice, much better than could now be effected by any great fundamental alterations. The only difficulty that attends them arises from their fictions and circuities: but, when once we have discovered the proper clew, that labyrinth is easily pervaded. Our system of remedial law resembles an old Gothic castle, erected in the days of chivalry, but fitted up for a modern inhabitant. The moated ramparts, the embattled towers, and the trophied halls, are magnificent and venerable, but useless, and therefore neglected. The inferior apartments, now accommodated to daily use, are cheerful and commodious, though their approaches may be winding and difficult. [III-267-68]

Even if one accepted the premise that the writ system had successfully adapted itself to the substantive legal requirements of a modern commercial society, it was still necessary to account for the apparent malfunctions that caused so much criticism. "People are apt to be angry at the want of simplicity in our laws: they mistake variety for confusion, and complicated cases for contradictory." [III-325] But an important cause of the appearance of confusion was precisely the "commerce and refinement" of modern England. [III-327] Likewise, the deplorable phenomenon of litigiousness arose from the very fact that the law had made it "an object indeed of the utmost importance in this free and commercial country, to lay as few restraints as possible upon the transfer of possessions from hand to hand, or their various designations marked out by the prudence, convenience, necessities, or even by the caprice, of their owners." [III-329] The inevitable consequence was endless litigation designed to fix the intentions of the parties.

Blackstone reserved the harshest words in his whole work for the common law judges who petrified the system of pleading through the rule that "every slip (even of a syllable or letter) was . . . fatal to the pleader, and overturned his client's cause." [III-409] These judges lacked "a decent degree of tenderness," and fell into "absurd reasons" to justify their practice, leading to the

"great obstruction of justice" and the "ruin of suitors." [III-411] The only solution was legislation to "remedy these opprobrious niceties," followed by efforts of "judges of a more liberal cast" to eliminate the "unseemly degree of strictness" of their predecessors. [*Id.*]

As for special pleading, since it had been "frequently perverted to the purposes of chicane and delay," the legislature had liberalized the system. [III-306] "And, though it should seem as if much confusion and uncertainty would follow from so great a relaxation of the strictness anciently observed, yet experience has shewn it to be otherwise . . ." [*Id.*] An encomium to a great jurist emphasized both that he was a "zealous defender of the laws and constitution of his country" and that he pursued "the true spirit of justice, notwithstanding the embarrassments raised by the narrow and technical notions which then prevailed in the courts of law." [III-55] His accomplishment was to respond to "the great change in property by the extension of trade and the abolition of military tenures" by building a new system upon a "wide and rational foundation." [*Id.*]

Given the success of these reforms, Blackstone could attribute any remaining delay and complexity in the process of litigation not to the legal system but to "liberty, property, civility, commerce, and an extent of populous territory." [III-423] "[T]ime and circumspection" were more necessary where "sutors have valuable and permanent rights to lose, than where their property is trivial and precarious." [*Id.*] The bald conclusion was that "[w]hatever instances therefore of contradiction or uncertainty may have been gleaned from our records, or reports, must be imputed to the defects of human laws in general, and are not owing to any particular ill construction of the English system." [III-328]

### 3. *The Theme of Civil Liberty*

Throughout the *Commentaries*, Blackstone insisted that "[t]he idea and practice of . . . political or civil liberty flourish in their highest vigour in these kingdoms, where it falls little short of perfection, and can only be lost or destroyed by the folly or demerits of its owner: the legislature, and of course the laws of England, being peculiarly adapted to the preservation of this inestimable blessing even in the meanest subject." [I-126-27] The great con-

trast was the civil law system of the Continent, which, as he pointed out over and over again, had been deeply tainted by "the despotic monarchy of Rome and Byzantium." [I-5, 56, 67, 74] The system of canon law, derived from Rome through the Papacy, was hardly more friendly to liberty. [III-99, IV-103]

This proposition, that the English common law had freedom as its very essence, depended on the vindication of the law of wrongs. This followed from the fact that the law of *rights* was in no way peculiarly a national system. The rhetoric of absolute and relative rights of persons, and of persons and things, was a version, albeit a modified version, of Roman, civilian and canonical jurisprudence, combined with the feudal notion of a hierarchy of relationships. Blackstone had created the "law of rights," and grafted it onto the writ system, in an effort to make that system intelligible, and to show that the liberal ideal of a rational administration of justice had been achieved behind the screen of the medieval forms of action. But if Blackstone had wholly assimilated the forms of action to his rational scheme, it would have been hard to see in what the common law was superior.

The paradigmatic case for that superiority was a specific remedial institution: the trial by jury. It was "the glory of English law," "the most transcendent privilege which any subject can enjoy," essential to the preservation of "his property, his liberty or his person." [III-379] Montesquieu's conclusion that because Rome, Sparta and Carthage had lost their liberties, England must eventually lose hers, was invalidated by the mere fact that each of the ancient states, "when their liberties were lost, were strangers to the trial by jury." [*Id.*]

When Blackstone was defending the law of wrongs against the charge that it was contradictory and incoherent, his theme was that what looked like absurdities were only "moated ramparts and embattled towers" that did not interfere with the "cheerful and commodious" apartments "now accommodated to daily use." [III-268] But the theme of civil liberty allowed a much more vigorous defense of technicality. Here, it was the very divergence of English pre-liberal law from the apparently rational models of the Continent that allowed it to serve liberal objectives. Trial by jury was again the paradigm:

[T]he liberties of England cannot but subsist so long as this *palladium* remains sacred and inviolate; not only from all open attacks . . . but also from all secret machinations, which may sap and under-



mine it; by introducing new and arbitrary methods of trial . . . . And however *convenient* these may appear at first, (as doubtless all arbitrary powers, well executed, are the most *convenient*) yet let it again be remembered, that delays and little inconveniences in the forms of justice, are the price that all free nations must pay for their liberty in more substantial matters . . . . [IV-350]

We have already noted the argument that delay and uncertainty in the law were the products of "commerce and prosperity" themselves, rather than of the medieval system that supposedly obstructed them. Blackstone interwove this claim with the alternative defense that the whole body of remedial law owed its apparent irrationality to its libertarian character. Simplicity was a feasible goal "[i]n an arbitrary despotic government, where the lands are at the disposal of the prince," and where the "bulk" of the population consists of "boors, or peasants, being merely villeins and bondsmen." [III-326] And as for delay, it had been eliminated in places like "Turkey, . . . where little regard is shewn to the lives or fortunes of the subject." [III-423. *See also* III-267]

The crucial link between the technicality of the law of wrongs and civil liberty was the restraint of the power of judges. The confusing and elaborate character of the law of wrongs was necessary in order that "as little as possible is left in the breast of the judges, whom the law appoints to administer, and not to prescribe the remedy." [III-266] By contrast, "in many other countries, every thing is left in the breast of the judge to determine," [III-327] and, in the extreme Turkish case, the "basha, on a summary hearing, orders which party he pleases to be bastinadoed, and then sends them about their business." [III-423]

[I]t is . . . one of the glories of our English law, that the species, though not always the quantity or degree, of punishment is *ascertained* for every offence; and that it is not left in the breast of any judge . . . to alter that judgment, which the law has beforehand ordained, for every subject alike, without respect of persons. For, if judgments were to be the private opinions of the judge, men would then be slaves to their magistrates; and would live in society, without knowing exactly the conditions and obligations which it lays them under. [IV-377-78. *See also* IV-75]

Once again, the trial by jury provided the clearest argument for English institutions, since it was in the fact-finding process that judicial discretion was particularly dangerous. The judges were a "select body of men, and those generally selected by the prince or such as enjoy the highest offices in the state, [and] their decisions, in spite of their own natural integrity, will have fre-

quently an involuntary bias toward those of their own rank and dignity." [III-379] This danger was at its greatest in criminal cases, and here Blackstone supplemented the horrible example of Turkey with the more compelling case of France, where justices "occasionally named by the crown" had power to "imprison, dispatch or exile any man that was obnoxious to the government." [IV-349]

#### 4. *The Objectivity of the Judicial Role: Law and Equity*

We have dealt thus far with the way in which the distinction and juxtaposition of rights and wrongs permitted Blackstone to legitimate the writ system and the rules of pleading. In this section, we are concerned with the same distinction as a means of legitimating the multiplicity of courts with different jurisdictions. The charge against English law was that the multiplicity of courts led to "abundance of rules that . . . thwart with each other, as the sentiments or caprice of successive legislatures and judges have happened to vary." [III-325] Blackstone was not particularly interested in defending the legislature. But it was one of his central theses that all the English courts did the same thing, and that that thing had nothing to do with "sentiments or caprice."<sup>21.1</sup>

The idea of evolution played a role here, as in the justification of the other elements of the system. The different courts had once formed a rational whole, with each allotted a particular function. But by a gradual process, each had acquired a jurisdiction essentially concurrent with each of the others. [III-37-56] The judges had accomplished this through fictions, as when the King's Bench, supposedly limited to trying civil suits in trespass, expanded its jurisdiction to cover *all* civil actions by the "surmise" that all defendants brought before it in civil actions had committed an imaginary trespass. Though these fictions might "startle the student," they were in fact "highly beneficial and useful; especially as this maxim is ever invariably observed, that no fiction shall extend to work an injury; its proper operation being to prevent a mischief, or remedy an inconvenience, that might result from the general rule of law." [III-43]

The demonstration that all the courts were the same might at first appear to support the charge that the system was prone to contradiction, since the judges in the different courts might

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21.1 Holdsworth, *Blackstone's Treatment of Equity*, 43 HARV. L. REV. 1 (1930).

differ in "sentiments or caprice." Blackstone's answer was that all the judges in all the courts were the "depositories of the laws; the living oracles, who must decide in all cases of doubt, and who are bound by an oath to decide according to the law of the land." [I-69] Because this role was *passive*, there was no problem of judicial arbitrariness:

The judgment, though pronounced or awarded by the judges, is not their determination or sentence, but the determination and sentence of *the law*. It is the conclusion that naturally and regularly follows from the premises of law and fact . . . Which judgment or conclusion depends not therefore on the arbitrary caprice of the judge, but on the settled and invariable principles of justice. The judgment, in short, is the remedy prescribed by law for the redress of injuries; and the suit or action is the vehicle or means of administering it. [III-396]

Blackstone listed three principal sources of law, each of which in its own way constricted judicial discretion. The first of these was "general custom," by which he meant the doctrine of precedent, "which it is not in the breast of any subsequent judge to alter or vary from according to his private sentiments: he being sworn to determine, not according to his own private judgment, but according to the known laws and customs of the land; not delegated to pronounce a new law, but to maintain and expound the old one." [I-69] The second was "special custom," by which he meant practices of private parties that had ripened into rights by prescription. [I-76-79] The third was statute law, with respect to which the sole role of the judge was "to interpret the will of the legislator" [I-59] even where that will was contrary to the pre-existing common law made by the judges themselves. [I-89]

Within this framework of *rules*, there was another source of law no less restrictive of the judge's freedom of action:

[N]either a court of equity nor of law can vary men's wills or agreements, or (in other words) make wills or agreements for them. Both are to understand them truly, and therefore both of them uniformly. One court ought not to extend, nor the other abridge, a lawful provision deliberately settled by the parties, contrary to its just intent. [III-435. *See also* II-379; II-288]

It is notable that Blackstone did not include the scientific character of legal reasoning in this catalogue of constraints. Reason, which was both the instrument and the goal of 18th century science, did figure, but as a disruptive factor. The doctrine of

precedent was subject to an "exception, where the former determination is most evidently contrary to reason," [I-69] but only where it was "manifestly absurd or unjust." [I-70] The narrow restriction of the exception meant that a judge who appealed to reason against a settled rule would not be followed. Even where the judge believed himself to be acting in an objectively reasonable fashion, "*the law*, and the *opinion of the judge*, are not always convertible terms . . . since it sometimes may happen that the judge may *mistake* the law." [I-71]

Reasonableness was also a limitation on the judge's obligation to follow private customs, though here again it was "artificial and legal reason, warranted by authority of law," rather than "every unlearned man's reason." [I-77] Statutes, on the other hand, were valid even if flatly "contrary to reason." "[I]f the parliament will positively enact a thing to be done which is unreasonable, I know of no power in the ordinary forms of the constitution that is vested with authority to control it." [I-91] Thus it is important not to confuse Blackstone's defense of judicial objectivity with the far more rationalist position of 19th and early 20th century American judicial conservatives. He was defending his version of what courts did, not against advocates of legislative supremacy, but against those who saw the common law and equity as opposed jurisdictions pursuing contradictory definitions of justice.

That the challenge was a serious one is evident from the organization of the *Commentaries*. As we have seen, Blackstone dealt with the writ system by redistributing the writs among the various rights. The law of wrongs *contained* all the writs, but did not present them as a system. Intermixed with these legal remedies, he also described the equitable redress, if any, that the victim of an injury could secure in chancery, [E.g., III-141, 163] thus merging the two systems. But he also devoted the final chapter of Book III to a separate, explicit consideration of the relationship between law and equity.

The first purpose of this section was to show that the two courts applied the same substantive body of law. To this end, Blackstone explained the *existence* of separate courts of equity in terms of historical accident. The common law courts had once had jurisdiction to deal with all injuries, but they had interpreted their own authority so narrowly that the chancellors had been able to intervene and take over matters the established system was ignoring. [III-433. *See also* III-55, 435-36] Over the course of time,

the common law courts had realized their error, and gradually extended themselves until they once again had substantive rules covering every aspect of the protection of rights. Thus the common law courts had developed their own rules about fraud, accident, mistake and trust, using "that implied contract, so highly beneficial and useful, of having undertaken to account for money received to another's use, which is the ground of an action on the case almost as universally remedial as a bill in equity." [III-432]

Although the two systems were "founded on the same principles of justice and positive law," [III-434] and were "inwardly bottomed upon the same substantial foundations," [III-437] there were differences in the business they did. Blackstone explained this is in part by the historical accident of exclusive equitable jurisdiction over some kinds of trusts and mortgages (though "the trust is governed by very nearly the same rules, as would govern the estate in a court of law" [III-439]). In part, the difference was a consequence of the different modes of securing proof and enforcing relief. It was more appropriate to bring fraud cases in equity, where the court could make the defendant testify under oath. Likewise cases where the remedy sought was specific performance. [III-436-40]

Having demonstrated that the two courts had essentially identical jurisdictions and applied the same principles, Blackstone had still to confront the claim that their *methods* were antipodal. That this was the case was part of the established wisdom of his time. Both advocates of law and advocates of equity insisted on the difference between them. [III-433, 440-41] "[T]he very terms of a court of *equity*, and a court of *law*, as contrasted to each other, are apt to confound and mislead us: as if the one judged without equity, and the other was not bound by any law." [III-429] From the accusations hurled back and forth, "strangers" might get the impression that law was "that harsh and illiberal rule, which many are too ready to suppose it," while equity was "the result of mere arbitrary opinion, or an exercise of dictatorial power, which rides over the law of the land, and . . . controls it by the loose and fluctuating dictates of the conscience of a single judge." [III-442]

Blackstone himself was ambivalent on this subject. In his defense of the technicality of the law of wrongs he had repeatedly emphasized that judicial restraint was essential to civil liberty. His examples of restraint were drawn from common law procedure. Equity, for example, eschewed trial by jury. The ar-

guments from "convenience" that threatened to undermine protection of the subject derived from equity, which used a general subpoena rather than some specific writ for the commencement of actions. The principal intellectual fountainheads of equity were the civil and canon law, which Blackstone saw as tainted with the absolutism of emperors and popes.

On the other hand, the whole argument that English law had evolved to meet the needs of a commercial society was dependent on the legitimacy of the equitable approach. It was the chancellors who, for example, had created the modern law of commercial credit and of mortgages when "narrow minded" common law judges "still adhered wilfully and technically to the letter of the ancient precedents." [III-435] "Every one who is conversant in our ancient books, knows that many valuable improvements in the state of our tenures . . . and the forms of administering justice, have arisen from this single reason, that the same thing was constantly effected by means of a *subpoena* in the chancery." [III-441]

The claim of the supporters of equity was that it had accomplished these beneficial results because it "abate[d] the rigour of the common law," and "determine[d] according to the spirit of the rule, and not according to the strictness of the letter." [III-430] The response of the common lawyers was that equity was "not bound by rules or precedents, but acts from the opinion of the judge, . . . founded on the circumstance of every particular case," so that it was no more certain than "the length of the chancellor's foot." [III-432; *id.*, n.(y)] Blackstone was willing to concede that this might once have been the case, [III-433, 440] but

if a court of equity were still at sea, and floated upon the occasional opinion which the judge who happened to preside might entertain of conscience in every particular case, the inconvenience that would arise from this uncertainty, would be a worse evil than any hardship that could follow from rules too strict and inflexible. Its powers would have become too arbitrary to have been endured in a country like this, . . . which boasts of being governed in all respects by law and not by will. [III-440. *See also* III-433]

Instead, it had become with time "a laboured connected system," [III-432] "a regular science, which cannot be attained without study and experience," [III-440-41] so that law and equity were "equally artificial systems." [III-434] In Blackstone's interpretation, nothing had been lost in this process of formalization, just as nothing had been lost by the liberalization of the common

law. The reason for this was that once one properly defined the legal and equitable approaches, one could see them as complementary aspects of a single judicial method. Both systems of courts ought to and did employ both approaches, alternating between them as the circumstances required.

Law and equity were not alternative (and contradictory) modes of law making. "[T]he measure of substantial justice ought to have been the same," and now was the same, no matter where the case was brought. [III-434] Rather, they were alternative modes of *interpreting the intentions* of the extrajudicial sources of all law. Of these, the most important were statutes and judicial precedents. With respect to each, both courts were equally bound and equally free.

In drafting statutes, "all cases cannot be foreseen; or, if foreseen, cannot be expressed." [III-430] Thus statutes are over- and underinclusive from the point of view of *legislative intent*. "These cases, thus out of the letter, are often said to be within the equity, of an act of parliament; and so cases within the letter are frequently out of the equity. Here by *equity* we mean nothing but the sound interpretation of the law." [III-431] When the judge faced such a situation, he had to choose between an equitable and a literal construction. "But there is not a single rule of interpreting laws, whether equitably or strictly, that is not equally used by the judges in the courts both of law and equity. . . . Each endeavours to fix and adopt the true sense of the law in question; neither can enlarge, diminish, or alter, that sense in a single title." [*Id.*]

Though it was clear that there was only one right thing to do, and that it didn't depend on one's jurisdiction, Blackstone had only this to say about how to make the concrete choice:

Equity thus depending, essentially, upon the particular circumstances of each individual case, there can be no established rules and fixed precepts of equity laid down, without destroying its very essence, and reducing it to a positive law. And, on the other hand, the liberty of considering all cases in an equitable light must not be indulged too far, lest thereby we destroy all law, and leave the decision of every question entirely in the breast of the judge. And law, without equity, though hard and disagreeable, is much more desirable for the public good than equity without law; which would make every judge a legislator, and introduce most infinite confusion; as there would then be almost as many different rules of action laid down in our courts, as there are differences of capacity and sentiment in the human mind. [I-61-62. See also I-91-92]

With respect to precedent, the situation was similar. To begin with, "[e]quity then, in its true and genuine meaning, is the soul and spirit of all law: *positive* law is construed, and *rational* law is made by it." [III-429] Nonetheless, the courts of equity were "governed by established rules, and bound down by precedents, from which they do not depart, although the reason of some of them may perhaps be liable to objection." [III-432] The specific rules of equity were "supported only by the reverence that is shewn, and generally very properly shewn, to a series of former determinations." [III-432-33] Blackstone listed half a dozen common law (not statutory) rules whose "artificial reason . . . arising from feudal principles has long ago entirely ceased. . . . In all such cases of positive law, the courts of equity, as well as the courts of law, must say with Ulpian, . . . '*hoc quidem perquam durum est, sed ita lex scripta est.*'" [III-430]

Yet the judges, both at law and in equity, had always the recourse implied in the slogan that "what is not reason is not law." [I-70] The judge who found a precedent "manifestly absurd or unjust" could take advantage of the "exception" to the doctrine of stare decisis that we have already noted. Blackstone urged caution, and pointed out that the mere absence of a reason for a rule was not enough to make it "repugnant to natural justice." [I-71] But he was no more specific about how the judge was to decide in such cases than he was about the permissible uses of fictions, or about the choice between equitable and strict modes of statutory interpretation.

This remaining element of uncertainty is more important for us than it was for Blackstone. He had accomplished the task of legitimation, in the face of the claim that the institutional system was incoherent, by demonstrating that there was no contradiction in the existence of separate courts of law and equity. And, by articulating the sources of law outside the "breast of the judge," he had refuted any notion that the law was a matter of sentiment and caprice. That conflict between the external sources (for example, reason versus precedent) might reproduce the problem of arbitrariness within the system designed to resolve it seems not to have occurred to him. The reasons for what seems today a kind of myopia will emerge as we take up Blackstone's role in the development of the liberal mode of mediation.



C. *The Right/Wrong Distinction as a Mediator:  
Blackstone's Liberalism*

In the preceeding section, I argued that if we understand Blackstone's intention to legitimate the 18th century English system for the administration of justice, we can also understand why he divided his *Commentaries* between a law of rights and a law of wrongs. The components of the administration of justice that were under attack were the writ system, the rules of pleading, and the multiplicity of jurisdictions. The law of wrongs grouped these institutions together, while at the same time reorganizing them so that they could be understood as designed to protect rights. Thus recast, Blackstone justified each in turn by showing that each furthered, rather than obstructed, the goals of a liberal polity.

There are three things about this process that are important for our purposes. Each will have analogues when we take up the internal division of the law of rights into rights of persons and of things, and the division of the rights of persons into absolute and relative rights. The first is that the institutions Blackstone tried to legitimate perished in spite of his efforts. The writ system, the rules of pleading and the multiplicity of jurisdictions turned out to be relics of the past, just as the liberals claimed. From the perspective of the present, Blackstone was engaged in a futile and indeed a wrongheaded enterprise.

Second, Blackstone changed English legal thought and indirectly helped to change English legal institutions by his very defense of them. The writ system was one thing when it was learned *on its own terms* by an apprentice in a law office. Trespass was trespass; trover was trover—knowing law meant knowing writs. But the writ system was something else, something less and something more vulnerable, after Blackstone had shown that its constituent elements could be disassembled and redistributed as appendages to a system of rights. It was likewise with the existence of separate courts of law and equity. True, Blackstone defended the system against attackers. But he defended it by showing that all the judges did or should do the same thing, that there was a single, consistent law of wrongs, rather than by affirming the intrinsic logic of the division.

Third, many particular ideas that Blackstone developed in his defense of the law of wrongs became commonplaces of 19th century American legal thought. The student of American judicial

writing in that period will already be familiar with most of the passages I have quoted about the relation of right to remedy, about "liberality" as the essence of evolving private law, about the relation between "strictness" and civil liberty, and about the passive, oracular role of the judge. For example, Chief Justice Marshall constructed both parts of his famous opinion in *Marbury v. Madison* around the maxim *ubi jus, ibi remedium*. If Marbury owned his commission, there must be a writ through which he could recover it; if the U.S. Constitution was law, the judiciary must respond when the legislature violated it. Blackstone was no republican and did not believe in judicial review, but Marshall quoted and cited him as his chief authority nonetheless.<sup>22</sup>

We need to understand the way in which Blackstone's defense of old institutions was also a contribution to a new form of legal theory, a theory that seemed to require and legitimate institutions radically different from those he had been concerned to perpetuate. We need, in other words, to fit him into the model of legal thought as an evolving enterprise of mediation sketched in Part I. Let me restate that model somewhat more elaborately before we begin.

First, there is the fundamental contradiction between our feelings of dependence on and integration into groups, and our feelings that we are isolates and that the collective is a threat. In the context of the administration of justice, we need and feel dependent on the apparatus of courts, judges and police. We identify with their processes. But we also fear that they will intervene arbitrarily in our lives.

Second, social thinkers develop theories that purport to harmonize these conflicting sentiments by showing that we can rationally allocate a role to collective intervention and a role to individual autonomy. In the context of the administration of justice, legal thinkers explain to us how we can define the role of courts so as to secure the benefits we desire without submitting to arbitrariness. Their modes of reasoning and their categorical schemes mediate the contradiction (while at the same time legitimating the status quo).

Third, generation after generation, legal thinkers criticize the existing modes of mediation, discrediting some, while abstract-

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22. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163, 165, 168, 176-80 (1803).

ing and generalizing others. In the process, they integrate and apparently strengthen the system of legal ideas, while at the same time making it more and more vulnerable. In the context of the administration of justice, they criticize the existing rationalizations of the behavior of judges, undermining some while abstracting and generalizing others. It is in terms of this third stage or moment that we need to interpret Blackstone's distinction between rights and wrongs.

The negative side of his accomplishment is relatively easy to grasp. At the time he wrote, the writ system, the rules of pleading, and the distinctions among courts were the only instruments available for dealing with the question: why do judges do this rather than that? By subordinating writs to rights and then dismembering the writ *system*, he denied that it was an adequate way of explaining or justifying what was going on. By asserting the essential identity of all the jurisdictions and of the methods used by all the judges, he denied that the fact that a case was decided in equity could explain or justify the way it came out. Although he did not explicitly criticize, indeed celebrated these institutions, he undermined them in ways that seem, if anything, more valid today than in his own time.

It is much more difficult to assess his positive accomplishment as a contributor to the emerging body of liberal legal/political theory. I have divided the task into three parts. The first presents the general liberal mode of mediation of the contradiction. The second argues that Blackstone made a crucial contribution to the viability of this mode. The third argues that he was nonetheless *not* a liberal in several crucial respects.

### 1. *The Concept of Right as a Mediator of Contradiction*

The liberal version of rights begins with three units: a weak person, a strong person, and the state. The weak person experiences contradictory feelings toward the strong person. On the one hand, he is necessary for trade, the division of labor, and the constitution of intensely solidary domestic units, all of which represent good fusion. On the other, the strong person threatens to dominate and thereby annihilate the weaker one.

At first blush, the addition of the state to the picture only makes matters worse, since the state is composed of people, and they threaten to use superior collective force to dominate and

annihilate both the weak man and the strong man. What the weak man needs is somehow to induce the state to use its force to control the strong man just to that extent that will permit good fusion with him, while preventing the people who compose the state from putting themselves in the strong man's place. The *initial* problem with such a strategy is that the extreme complexity of social and political relationships makes it difficult to decide what exactly the state may and may not do.

In liberal theory, the concept of rights answers this question. If we believe that there is such a thing as a right, that we have rights, and that we know what they are, then we can specify both what the state must do to the strong to protect the weak, and what it may not do to *either* strong or weak. A person who believes in rights is in a position to deny that his feelings about others are contradictory. He can believe that he wants to fuse with them *so long as they respect his rights*. He can believe that he is fused with the state so long as it protects rights, and opposed to it when it does less or more. A belief in rights can mediate the fundamental contradiction.

But we are concerned with more than the beliefs of individuals about the contradiction. We are concerned with the social phenomenon of legal thought. That is, we are concerned with the way in which some actors persuade others that it is possible to overcome the contradiction in practice as well as in theory. A concept of rights needs two supports if it is to become a theory of how we can collectively solve the problem of relations with others. The first of these is an explanation of how there could be a consensus about who has what rights. Without the specification of a source or *theory* of rights, there is no reason for the weak man to believe that a right-enforcing state is any better than the tyranny of the strong.

The basic alternatives here are (a) that rational reflection on human nature and the structure of social life will tell us what rights we have, or (b) that we can arrive at legitimate decision rules about how to specify rights even if we can't guarantee that all rational people will agree on the substantive outcomes of this process. Liberal political and legal thought has embraced sometimes one, sometimes the other, and sometimes both of these.<sup>23</sup>

The second necessary support is a theory of the judicial role,

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23. See Kennedy, *Legal Formality*, 2. J. LEGAL STUD. 351, 361-62 (1973).

that is, a theory of how a right-enforcing state can avoid foundering on the biases of the people who do the actual enforcing. The issue is not the control of the police, but the control of the judiciary, who, as a practical matter, must exercise the power of making the abstract political formulations sufficiently concrete so that they can suggest answers to particular questions about the exercise of private and public force.

Here, again, there have been two alternative approaches: (a) the judge arrives at a specific rule by a process of reasoning that reveals the necessary implications of abstractly formulated rights for particular cases, and (b) the legal order specifies by rules when the judge should intervene, and if there is no rule directing him to intervene, he is to keep still, leaving the outcome to be determined by the balance of private power. Liberal theorists have adopted one or the other or both of these approaches.<sup>24</sup>

Although they address different issues, the two pairs of alternatives have a similar internal structural relationship. A person who takes the view that the source of rights is some kind of collective decision process is also likely to believe that judges should be rule appliers, and should not intervene where they cannot find a rule directing them to do so. There is likewise a connection between the view that we can discover our rights through reason and the view that the judge can rationally elaborate abstract formulations of rights into particular rules that will justify his intervention in "new" or unsettled situations. The common thread in the first two positions is skepticism about the objectivity of reason, about its power to generate a correct, and therefore universally acceptable, answer to a difficult question. By contrast, the second two positions rest on a more confident and expansive view of reason.

There is no *logical* connection between believing in reason as a source of rights and believing in reason as a means for rendering them concrete once identified. The two processes are distinguishable, and there is nothing in *thought* that prohibits us from reaching one conclusion on the first issue and a quite different one on the second. Indeed, one way to interpret late 19th century American constitutionalism is as a combination of insistence on a processual (constitutional) definition of rights with extravagant faith

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24. See Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1760-66 (1976).

in judicial capacity to draw particular conclusions from the posited abstractions.

Liberal political/legal theory is characterized by a deep consensus that rights exist, that we have them, and that their content is knowable. All the modes of mediating the fundamental contradiction that I will call liberal share this central common trait: the sense of the reality of rights is close to the sense of the reality of physical objects in the world. But *within* liberalism, there is constant dissensus about the choice between alternative theories of the source of rights, and between alternative conceptions of the judicial role. This dissensus is also a defining characteristic of liberalism as a school. Thus the theories of natural law and positivism, of judicial activism and judicial passivism are all equally within the liberal tradition.

The rest of this section describes Blackstone's ambivalent relationship to this tradition of mediation. I want to argue that he contributed in an important way to making rights plausible; that he posed clearly the internal problems about the source and administration of rights that have bedevilled it ever since; but that, by opposing rights to wrongs instead of to powers, he implicitly rejected a crucial implication of liberalism.

## 2. *Blackstone a Liberal*

Blackstone's most important accomplishment was to show that it was possible to turn the liberal political slogan "rights" into a plausible account of several thousand common law rules. Crises involving foreign policy, or particular pieces of legislation affecting an important interest, or executive action endangering political rights, have been the stuff of political writing and political theory for hundreds of years. But what the state mainly does is to enforce a staggeringly complex system of rules governing the day to day interactions of ordinary people. Political writers and political theorists responded to the crises with the notion of rights as a rationale and limitation for state action. Blackstone went a long step further than they had. He claimed to show that rights were the key not just to understanding, say, the situation of John Pym when the Crown tried to make him pay ship money,<sup>25</sup> but to understanding every one of the rules governing real property.

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25. *King v. Hampden*, 3 St. Tr. 825 (Ex. Ch. 1637).

Blackstone did not invent the idea of rights as a mediator of the fundamental contradiction. That was the accomplishment of John Locke, of 17th century radicalism, of the Declaration of Rights and the Glorious Revolution. He did not even invent the idea that the forms of action could be made to follow from a catalogue of absolute and relative rights. He took that idea from Hale's posthumously published *Treatise*.<sup>26</sup> Nonetheless, anyone who has endured the chaos of legal education will be happy to grant him his due. Liberal theory could not be complete, the idea of rights could not be plausible, until someone had integrated into it the technical, half-forgotten, but obviously crucial domain of the common law. The common law, for its part, must remain no more than intermittently intelligible even to the most diligent political theorist so long as its peculiar vocabulary of forms, pleadings and jurisdictions was unassimilated to the discourse of educated laymen.

Blackstone's approximation of the law of wrongs—the collection of rules that define what the state apparatus can do to a private person—to the catalogue of rights was only preliminary. But it was nonetheless heroic. The sheer number of written reports of precedents was much smaller in his time than in ours, but it was still large enough so that his book was only for beginners. And Blackstone had available no more than a handful of rudimentary treatise-like works on particular subjects. What he attempted and accomplished was a quantum leap from a situation in which political theory had no grasp at all on the common law to one in which the remaining task was one of internal reorganization and refinement. Subsequent systematic writers like Kent, Story, Austin, Pollock, Holmes, Terry and Pound took for granted that it was *possible* to see the common law as a unity, and quarreled about the nature of that unity. For all their analytic superiority, they were in his debt and worked always in his shadow.

Blackstone's contribution to the two supporting bodies of theory, of the source of rights and of the judicial role, was of a somewhat different kind. We have seen that he resolved the problem of the source of rights by claiming that the judge simultaneously enforced the will of the sovereign and defended rights that were grounded in nature and existed independently of any human laws. The fate of this formulation was paradoxical: it was the first extended, careful attempt to deal with a major difficulty of the liberal mode of mediation through rights. The subsequent debate

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26. See note 12 *supra*.

unfolded within the structure of alternatives it presented, but *no one* accepted it as an adequate statement.

For some, Blackstone represented the extreme positivist position, for others an equally extreme version of natural law. The more perceptive saw him as internally self-contradictory. For all, he represented a convenient starting point *because* he tried to condense Hobbes and Locke into a single definition. His work posed the issue of the potentially contradictory character of liberal political theory in a way that was inescapable precisely because he so blatantly tried to have the best of both possible worlds.<sup>26.1</sup>

With respect to the administrative problem, that of defining the role of the judge in reducing the abstractions of the theory of rights to rules for particular cases, Blackstone's contribution was taken much more for granted. The notion that "liberality" modernized the common law while a contradictory technicality preserved civil liberty was restated in one form or another all through the 19th century. Law and equity merged in practice as well as in theory, but no one went beyond Blackstone's cryptic explanation that, as *methods*, law and equity were incompatible but both essential. It was only at the end of the 19th century that the problem of the objectivity of the judicial role came to the fore, but it has been the obsession of liberal legal thought ever since. And here again, the terms of the debate are those Blackstone set in the *Commentaries*, though his way of "resolving" the problem seems no more plausible than his attempted finesse of the issue of the origin of rights.

It was not only to Anglo-American *jurisprudence*—self-conscious theorizing about "what is law"—that Blackstone contributed. American constitutional law had also to develop a way of dealing with the version of the fundamental contradiction represented by the issues of the source of rights and the mode of their administration. If they were merely the will of the legislature, mechanically enforced by the judge, then the individual was at the mercy of the collective embodied in the state. If they were defined independently of the collective by nature and reason, and then freely interpreted by the judge, then the collective might be powerless to aid the weak against the strong. The belief in the objective validity of rationally based conclusions about rights, if mistaken, might par-

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26.1. See Shapiro, *Blackstone, William*, 2 INT'L ENCY. SOC. SCI. 81 (1968); Hart, *Blackstone's Use of the Law of Nature*, 3 BUTTERWORTH'S S. AFRICAN L. REV. 169 (1956); McKnight, *Blackstone, Quasi-Jurisprudent*, 13 SW. L. J. 399 (1959); Waterman, *Thomas Jefferson and Blackstone's Commentaries*, 27 ILL. L. REV. 629 (1933).



alyze the state and prevent it from fulfilling its essential protective function.

Blackstone's solution, as we have seen, was that Parliament itself had "from time to time asserted" the fundamental rights of Englishmen, so that, in Magna Carta and the Declaration of Right, they had acquired the status of positive law. The judges were "oracles" of this amalgam of the rational and the positive, and their power was nonproblematic because their judgments were those "of the law," rather than their "private" sentiments, opinions or caprices. Both elements—the fusion of natural and positive law, and the impersonal passive conception of the judge—have remained central in the American version of liberal mediation.

That version is based, first, on the combination of popular sovereignty with the notion of the constitution as higher law. When the people adopt a constitution protecting rights, they do exactly what Blackstone's Parliament did, but at a higher institutional level. His solution was thus a model for ours. The second basis of the American solution is the separation of powers combined with judicial review. It is because it has "neither force nor will" that the judiciary is the least dangerous branch of government, and can be the checker unchecked of the other branches. Blackstone's strategy for legitimating the limited power of 18th century judges thus survived to play a far more exalted role in American legal thought.

### 3. *Blackstone not a Liberal*

Thus far, I have spoken of Blackstone's contribution to liberalism as though liberalism were a house that legal thinkers were building according to a blueprint. We might imagine Hobbes laying the positivist half of the foundation while Locke was at work on the natural rights half. Blackstone then came along to add a first floor consisting of connections between rights and the technical rules of the system. The notion that the judge is a passive oracle will support the second story, and Blackstone's idea of natural rights made positive through statutory declarations is a first imperfect sketch for a roof that will ultimately involve popular sovereignty, a written constitution and judicial review.

The problem with conceiving the enterprise of mediation in this way is that each successive thinker had a quite different conception of the whole building than the others, and there was nothing to make any of them stop when they had completed the

part that was to be "their contribution" to liberalism as it finally emerged. In general, their apologetic intentions led them to construct what they saw as complete edifices of theory, using elements from the past and non-liberal elements of their own invention, as well as liberal ones. Taken as wholes, these edifices harmonized with the actual legal institutions of the day, rather than with what we now see to have been the unfolding tendency of liberal thought.

For this reason, successive generations of theorists spent as much time *de*-constructing the work of predecessors as they did in carrying out their own ideas. We have already seen Blackstone at work taking apart the writ system and the distinction between law and equity. Now we need a sense of how *he*, rather than the liberal theorists who succeeded him, integrated the liberal elements of his thought with others that would have to be deconstructed in their turn.

I have been arguing that the notion of rights as a mediator of the fundamental contradiction is the defining characteristic of liberalism. In order for rights to mediate, we must conceive of a situation of conflict between two individuals, with the state as arbiter. Rights then function to define exactly what the state can and cannot do. In other words, the idea of rights as a mediator presupposes a set of other ideas, namely: individual (=non-state=private), state (=non-individual=public), and state power.

What makes the idea of rights, with its cluster of associated concepts, crucial to liberalism is that liberals use it to structure their understanding of *every* application of force to a person. All such applications originate either in a private individual or in the state. If private, they are either consistent or inconsistent with the rights of the individual. If the force is public, it is a legitimate exercise of power if protective of rights; illegitimate if it goes beyond the protection of rights to serve other purposes (which must, by definition, be private rather than public).

The idea of rights has been used for centuries as a mediator of *some* problems of force. The accomplishment of liberalism was to generalize the rights analysis until it had become all-pervasive, indeed universal, within legal thought. In order to accomplish this, liberal thinkers had to make the analysis more and more abstract. They had to discover the individual, his rights, the state, and its powers, in places where earlier thinkers had seen much more particular entities, and to do this they had to deprive their basic analytic tools of the more particular contents they had had when used only in a limited number of contexts. This is the process

of discrediting of some mediators along with the progressive abstraction and generalization of those remaining that I have already alluded to.

Blackstone presented law as a whole in terms of a dichotomy between rights and the administration of justice that put those rights into effect. In so much as he was thereby able to show that technical common law rules of property, tort and contract flowed directly from the natural rights of property, bodily security and freedom of locomotion, he advanced the liberal enterprise. But his dichotomy between rights and the administration of justice was also a mystification of the state and its powers. In that respect it was antiliberal (as well as nonliberal), and constituted an obstacle it took subsequent liberal thinkers many decades to overcome.

The problem was that Blackstone's law of rights included much more than a catalogue of the rights of the individual, while his law of wrongs was much *less* than a catalogue of state powers flowing from and justified by those rights. He organized the *Commentaries* as though the main thing that needed justification was the power of *the judges*. He drew that justification from the total pattern of legal relationships in 18th century England, including that between Parliament and subject, and that between the Crown and those who owed it allegiance. Thus the "rights" of Books I and II included the rules governing the legislative and executive *powers*, while the law of wrongs dealt only with the rules that controlled the judiciary. The existence of legislative and executive powers were first of all reasons for the existence of *judicial* powers, rather than being in themselves objects of justification.

What this means is that the idea of a right in Blackstone played only an aspect of the role it was later to play in liberal thinking. State and individual did not yet stand starkly opposed to one another in the form of a primary division between public and private law. The problem of *judicial* force had been reduced to the problem of rights, but the *general* problem of force seemed amenable to a number of different solutions, some involving simply the notion of the protection of rights, but others involving quite distinct modes of mediation.<sup>27</sup>

There is a misconception of Blackstone's apparently confused approach that we need to guard against. We must not interpret his

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27. See Parts III and IV *infra*.

focus on judicial power as making him closer to the modern conception of the "rule of law" than he was. Our modern doctrine of intensive judicial review of the constitutional validity of legislation, the constant process of judicial monitoring of administrative action, and the evident creative role of the judge in defining private law rights, combine to make our legal culture spectacularly judgo-centric. This tendency is the more intense because we explicate and criticize judicial activity *as though* judges were the passive conduits of an elusive social rationality. By contrast, we treat legislative and executive action as intrinsically resistant to reasoned analysis, so that legal thought finds the judiciary a congenial as well as a socially powerful focus for attention.

Blackstone, as we have seen already, contributed mightily to the theme of judicial rationality. His choice to oppose the judicial *power* to the *rights* of everyone else, including king and Parliament, has therefore a deceptively modern cast. But Blackstone was anything but an advocate of government by judiciary. Indeed, his segregation of judicial from legislative and executive power reflected not a particularly strong sense of the separateness and supremacy of the courts, but quite the opposite.

He did have a clear notion of the separation of powers, in the sense of the institutional segregation of the functions of legislation, executive action and adjudication. His statement echoing Montesquieu on the importance of the autonomy of the courts has become a classic:

In this distinct and separate existence of the judicial power in a peculiar body of men, nominated indeed, but not removable at pleasure, by the crown, consists one main preservative of the public liberty, which cannot subsist long in any state unless the administration of common justice be in some degree separated both from the legislative and also from the executive power. Were it joined with the legislative, the life, liberty, and property of the subject would be in the hands of arbitrary judges, whose decisions would be then regulated only by their own opinions, and not by any fundamental principles of law; which, though legislators may depart from, yet judges are bound to observe. Were it joined with the executive, this union might soon be an overbalance for the legislative. [I-269]

This is one of those passages that meant much more to later generations of liberal theorists than it did to Blackstone himself. Remember that Blackstone did not believe in judicial review. Even the doctrine that judges control the *executive*, by treating

extra-legal acts of officials as though they were private torts, plays only a minor role in the *Commentaries*. He was unequivocal that "[t]he principal duty of the king is, to govern his people according to law," [I-233] and he explained that "the king can do no wrong" was a restraint rather than an authorization of executive action (since it precluded the king's administrative agents from claiming that his extra-legal approval validated their acts). But the only example he gave was that of parliamentary impeachment of ministers of state. [I-243-46]

In *general*, the notion of balance within the constitution meant the balance among crown, nobility, and commons, guaranteed by the tripartite division of parliament. The passage quoted was all he had to say about the separation of *functions*, but he went on at length and repeatedly in attributing to the system of mixed government the safeguard of liberty by checks and balances:

And herein indeed consists the true excellence of the English government, that all the parts of it form a mutual check upon each other. In the legislature, the people are a check upon the nobility, and the nobility a check upon the people; by the mutual privilege of rejecting what the other has resolved: while the king is a check upon both, which preserves the executive power from encroachments. And this very executive power is again checked and kept within due bounds by the two houses, through the privilege they have of inquiring into, impeaching, and punishing the conduct (not indeed of the king, which would destroy his constitutional independence; but, which is more beneficial to the public,) of his evil and pernicious counsellors. [I-154-55. *See also* I-49-52]

The separation of governmental *functions* was a makeweight rather than the centerpiece in Blackstone's scheme, and he did not even dream of a judicial power superior to all the others.<sup>28</sup> The juxtaposition of rights (and powers masquerading as rights) to the activity of the judges came about, first, because it was the administration of justice Blackstone set out to vindicate; second, because it permitted him to obscure the conflict of the important powers with the important rights of Englishmen; and, third, because the judicial power was not yet sufficiently distinct as a conceptual entity to make this procedure problematic. It is this third point we need to explore in order to understand the limits of Blackstone's liberalism.

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28. *See generally* M. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS (1967).

The insignificance of the judges in Blackstone's scheme of politics was bound up with what I will call the customary theory of law, to be sharply distinguished from the alternative liberal theories of natural rights and positivism. The essence of the customary theory was that law was rational neither because it was the product of legislative will nor because the intellect could derive its rules by contemplating the necessities of abstract man in the state of nature. Rather, law was rational because it ratified with state force a set of customary practices defining the hierarchy of social orders, and that hierarchy had the rationality of nature as a whole.

To begin with, all English constitutional law—essentially the law of the organization and powers of the king in Parliament—was customary.<sup>29</sup> It reflected and reinforced the political relationships among king, clergy, nobility, gentry and burghers, whose hierarchical ordering defined English politics. The common law, created by the judges to resolve disputes between individual members of the particular orders, was also customary. Its premise was the legitimacy of the existing hierarchy, and its role merely to reflect it accurately. Within such a system, there were only two governmental functions. The king was to enforce all the customs reflecting the natural order of things, while dealing with external affairs. And the king, along with the two houses of Parliament, were a court: as the assembly of all the orders, they were final arbiters of disputes about the implications of hierarchy. There was no legislative function, in the positivist sense, at all, since the very meaning of law was correspondence to an ordering that had no human author.

Blackstone has been rightly accused of lying about the *reality* of the English constitution of his day, by simply suppressing the existence of cabinet government. Through the cabinet, the Commons had turned the coup d'état of 1688 into a new system, much closer to one of popular sovereignty than Blackstone would admit. But though he defended a nonexistent royal veto of legislation and the "absoluteness" of the king's executive power, he was no defender of the customary vision of English government.

We have seen already that he affirmed that "sovereignty and legislature are convertible terms," and sovereignty meant "absolute despotic power." In his view, Parliament had exactly the

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29. See generally J. GOUGH, *FUNDAMENTAL LAW IN ENGLISH HISTORY* (1955).

function the customary view denied it: "It can alter the established religion . . . . It can change and create afresh even the constitution of the kingdom and of parliaments themselves . . . ." [I-161] Indeed, it had *actually done* each of these things. [*Id.*] We have seen also that Blackstone was perfectly capable of distinguishing the judicial function from those of making and executing the laws, in spite of the fact that there was no place at all for a distinctly organized judicial function in what I am calling the customary view. Blackstone was not a Tory, let alone a reactionary. He was a "Constitution Whig"—a liberal, but of the antiquated vintage of the Glorious Revolution.

Nonetheless, the customary view died hard, and it intruded with surprising frequency in the *Commentaries*. For example, immediately following his encomium to legislative absolutism, Blackstone pointed out that "as every court of justice hath laws and customs for its direction, some the civil and canon, some the common law, others their own peculiar laws and customs, so the high court of parliament hath also its own peculiar law." [I-163] He persisted at least in the locution of judicial power throughout the ensuing discussion of Lords and Commons. [*E.g.*, I-164]

Blackstone's presentation of the role of the judiciary was also tinged with the customary view. He began his introductory chapter "Of the Laws of England" with the division between unwritten and written law. The unwritten law "includes not only *general customs*, or the common law properly so called; but also the *particular customs* of certain parts of the kingdom." [I-63] There followed what purported to be a historical description of written collections of customs (*i.e.* law books), ending with the assertion that:

the maxims and customs, so collected, are of higher antiquity than memory or history can reach: nothing being more difficult than to ascertain the precise beginning and first spring of an ancient and long established custom. Whence it is that in our law the goodness of a custom depends upon its having been used time out of mind . . . . This it is that gives it its weight and authority: and of this nature are the maxims and customs which compose the common law . . . of this kingdom. [I-67]

Along the same line, Blackstone listed the judicial power as part of the king's royal prerogative. He was the "fountain of justice":

By the fountain of justice, the law does not mean the *author* or *original*, but only the *distributor*. Justice is not derived from the king, as from his *free gift* . . . . He is not the spring, but the reservoir, from whence right and equity are conducted . . . . The original power of judicature, by the fundamental principles of society, is lodged in the society at large; but . . . [for reasons of convenience] every nation has committed that power to certain select magistrates . . . and in England this authority has immemorially been exercised by the king or his substitutes. [I-266-67]

On the next page, we learn that, "by the long and uniform usage of many ages," all the king's judicial power was delegated to judges independent of him. [I-267]

One of the most striking instances of the customary view is Blackstone's treatment of the relationship between judge-made and statutory law. For example, it is a fundamental principle that where the common law and a statute differ, the common law gives place to the statute. [I-89] This maxim, in the liberal view, is a direct implication of parliamentary sovereignty. But Blackstone explained it by "a general principle of universal law, that '*leges posteriores priores contrarias abrogant*.'" (Later laws abrogate earlier ones). [*Id.*]

Again, he classified *all* statutes as "either *declaratory* of the common law, or *remedial* of some defects therein. Statutes are declaratory, where the old custom of the kingdom is almost fallen into disuse, or become disputable; in which case the parliament has thought proper . . . for avoiding all doubts and difficulties, to declare what the common law is and ever hath been." By contrast, remedial statutes "supply such defects, and abridge such superfluities, in the common law, as arise either from the general imperfection of all human laws, from change of time and circumstances, from the mistakes and unadvised determinations of unlearned (or even learned) judges, or from any other cause whatsoever." [I-86]

In the customary view, king and Parliament were institutionally distinct, but the judicial power was merged with both, rather than distinct from both. The common law was neither particularly the province of the judges nor was it distinctively *private* law. It was the totality of customs, those governing both the allocation of political power and the definition of private rights and relationships. The judges were responsible for all of it, but in full control of none of it. Not only were they institutionally subordinate; they derived the law they interpreted and enforced from



the practices of all the social institutions of the time, including those of political bodies like Parliament, those of established institutions like the church and the nobility, and the purely private activities of individuals.

Against the background of the customary view, Blackstone's decision to juxtapose an amalgam of rights and powers to the isolated power of the judges is intelligible as something more than a failure of liberal imagination. Indeed, the isolation of the judges now appears as a necessary act of deconstruction of the earlier view that had denied them a distinct existence. It was on the basis of this transformation—the elevation of the judicial power to the status of a distinct entity within the constitutional scheme—that later thinkers built the modern notion of separate functions separately institutionalized as powers.

Looked at in terms of the secular enterprise of developing the liberal mode of mediation, we measure Blackstone's success by the hundreds of quotations of his elegant paragraphs on the derivation of remedies from rights, the passive rationality of the judge, and the separation of powers. I have argued in this section that this approach gives him both less and more than his due. It underestimates the importance of the work of deconstructing earlier systems while reorganizing their elements. And it overestimates the importance of the selected passages because it disregards the way their context of nonliberal elements limited or transformed their meaning. Both forms of distortion reinforce the hold of the theory; they distort with a bias. They make liberalism look like the product of a linear process of accretion of truths, or, at worst, like a timeless way of understanding the world.

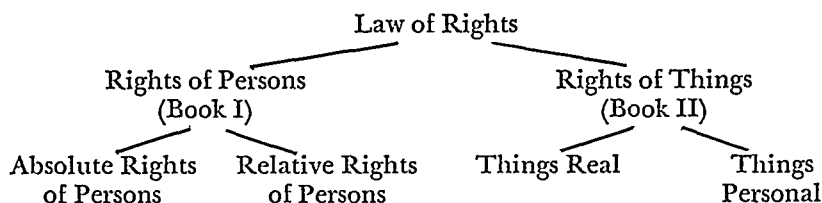
### PART THREE

#### ABSOLUTE VERSUS RELATIVE RIGHTS OF PERSONS

One might describe what I tried to do in Part II as the reduction of wrongs to rights. Blackstone's own explanation of the distinction was that because law commands what is right and prohibits what is wrong, it was "natural" to treat rights and wrongs separately. But from our point of view, the division is not only unnatural, it is strained and confusing. So we developed an explanation of *why* one would make such an odd choice. In the

process we showed that the law of wrongs had no internal structure of its own. Its organization was *derived* from that of the law of rights. Understanding the character and nature of the derivation allowed us to understand both the role of the *Commentaries* as apology and their role in the development of the liberal mode of mediation.

Since the internal structure of wrongs was that of rights, we can now forget about the former and address ourselves to the latter, with some confidence that we won't be missing a crucial element in Blackstone's organizational scheme. He subdivided the law of rights as follows:



The method followed thus far would suggest that we now proceed to investigate the distinction between the rights of persons and the rights of things. But I have adopted a different approach, for reasons that will appear in the course of the exposition. I will take up both the absolute/relative distinction within Book I and the internal organization of Book II before addressing the more general distinction between the two books themselves.

I have divided the discussion of the absolute/relative distinction into two sections. The first describes the contents of the categories of absolute and relative rights, and argues that the distinction does not correspond to any of our familiar basic divisions. The second argues that the intention lying behind the distinction was to legitimate those characteristic English 18th century legal institutions that were problematic from the perspective of liberal political theory.

#### A. *What Needs Explaining*

Blackstone introduced the distinction between absolute and relative rights of persons as follows:

The rights of persons considered in their natural capacities are . . . of two sorts, absolute and relative. Absolute, which are

such as appertain and belong to particular men, merely as individuals or single persons: relative, which are incident to them as members of society, and standing in various relations to each other. [I-123]

Like most of Blackstone's initial definitions, this one is misleading. It put all the emphasis on the distinction between the universal or abstract character of absolute rights, as opposed to the particularity of relative rights. "Relative" here meant "arising from particular relationships." A right of this kind can always be referred to some action of the party who possesses it (for example, marriage) or to some nonuniversal characteristic that distinguishes some people from others (for example, noble birth).

But the absolute/relative dichotomy also suggested another aspect of the rights it classified. Absolute rights were those "which are so in their primary and strictest sense; such as would belong to . . . [people] merely in a state of nature, and which every man is entitled to enjoy, whether out of society or in it." [*Id.*] Absolute rights were not synonymous with *natural* rights. Blackstone's notion was that in a state of nature, men possessed "natural liberty" which "consists properly in a power of acting as one thinks fit, without any restraint or control, unless by the law of nature . . . . But every man, when he enters into society, gives up a part of his natural liberty, as the price of so valuable a purchase . . . . Political therefore, or civil liberty, which is that of a member of society, is no other than natural liberty so far restrained by human laws (and no farther) as is necessary and expedient for the general advantage of the public. [I-125]

Thus the absolute rights of individuals were derived from, but by no means co-extensive with the natural rights of the state of nature, and it was absolute, not natural, rights that Parliament had positivized by statute "as often as they were thought to be in danger." [I-127] They were "no other, than either that *residuum* of natural liberty, which is not required by the laws of society to be sacrificed to public convenience; or else those civil privileges, which society hath engaged to provide, in lieu of the natural liberties so given up by individuals." [I-129]

Though they secured no more than a residuum of natural liberty, absolute rights were more important than any others:

[T]he principal aim of society is to protect individuals in the enjoyment of those absolute rights, which were vested in them by the immutable laws of nature; but which could not be preserved

in peace without that mutual assistance . . . which is gained by the institution of . . . social communities. Hence it follows, that the first and primary end of human laws is to maintain and regulate these *absolute* rights of individuals. [I-124]

In his next sentence, Blackstone drew a sharp contrast: "[s]uch rights as are social and *relative* result from, and are posterior to, the formation of states and societies: so that to maintain and regulate these, is clearly a subsequent consideration." [*Id.*] Relative rights were *not* part of the positivized residuum of natural liberty. They were "rights and duties of persons as they are *members of society*, and stand in various relations to each other." [I-146] (emphasis added) If we are to understand this opposition of the natural and the social, which Blackstone treated as parallel to that between the abstract and the particular, we need a sense of the contents of the categories of absolute and relative rights.

## 1. *The Content of Blackstone's Categories*

### (a) *Absolute Rights of Persons*

Blackstone devoted only sixteen pages of the 485 in Book I to absolute rights, and only twenty more to the discussion in Book III of wrongful interference with them. He was aware that this might strike the reader as odd, given his heavy rhetorical emphasis on this category:

[T]he principal view of human laws is, or ought always to be, to explain, protect, and enforce such rights as are absolute, which in themselves are few and simple: and then such rights as are relative, which, arising from a variety of connexions, will be far more numerous and more complicated. These will take up a greater space in any code of laws, and hence may appear to be more attended to, though in reality they are not, than the rights of the former kind. [I-124-25]

The contents of the chapter on absolute rights is a hodgepodge of elements, almost all of which are familiar to us. Blackstone believed that he could "reduce" the absolute right of Englishmen to three: "the right of personal security, the rights of personal liberty, and the right of private property." [I-129] Blackstone divided the law respecting each of these between Book I and Book III according to the method I've already described. It is only by putting the two treatments together that we get a full picture of the *civil* treatment of the right. Book IV on crimes was organized

according to its own special principles, and did not use the absolute/relative distinction.

In Book I we learn that "life," or security, is "a right inherent by nature in every individual." Blackstone then proceeded to an enumeration of public and private law rules derived in what seems an almost random manner from the postulated abstraction. Life begins at quickening, so that abortion is a crime; the right of security is the basis of a derivative right of self-defense; transactions made under duress are void; and the law protects the right by furnishing men "every thing necessary for their support. For there is no man so indigent or wretched, but he may demand a supply sufficient for all the necessities of life from the more opulent part of the community, by means of the several statutes enacted for the relief of the poor . . ." [I-131]

One might forfeit the right by civil death, or by committing an offense for which the legal punishment was loss of life or limb, but the infliction of criminal punishment was subject to important limitations:

[W]henever the *constitution* of a state vests in any man, or body of men, a power of destroying at pleasure, without the direction of laws, the lives or members of the subject, such constitution is in the highest degree tyrannical; and . . . whenever any *laws* direct such destruction for light and trivial causes, such laws are likewise tyrannical, though in an inferior degree; because here the subject is aware of the danger he is exposed to, and may, by prudent caution, provide against it. . . . [T]he constitution is an utter stranger to any arbitrary power of killing or maiming the subject without the express warrant of law. [I-133]

The section of the law of wrongs (Book III) dealing with the absolute right of personal security was much less chaotic. It covered the torts of assault, battery, wounding, and mayhem; it described the action on the case for "culpable omissions" injurious to health, along with the torts of libel, slander and malicious prosecution. All of these fall into our category of private law, and they correspond, very roughly, to the organization of many modern torts books.

Blackstone began his discussion of the right of personal liberty by comparing it with personal security: "we may make the same observations as upon the preceeding article, that it is a right strictly natural; that the laws of England have never abridged it without sufficient cause; and, that in this kingdom, it cannot ever be

abridged at the mere discretion of the magistrate, without the explicit permission of the laws." [I-134] Nonetheless, "[t]o assert an absolute exemption from imprisonment in all cases, is inconsistent with every idea of law and political society; and in the end would destroy all civil liberty, by rendering its protection impossible." [III-133]

Both in Book I and in Book III, the main emphasis was on the writ of habeas corpus and the Habeas Corpus Act as restraints on the power of the executive to imprison the subject without judicial due process. Blackstone remarked, however, that "when the state is in real danger, even this may be a necessary measure. But the happiness of our constitution is, that it is not left to the executive power to determine when the danger of the state is so great as to render this measure expedient; for it is the parliament only, or legislative power, that, whenever it sees proper, can authorize the crown, by suspending the *habeas corpus* Act for a short and limited time." [I-136] Though the main emphasis was on public law, there were references to private false imprisonment: "the keeping a man against his will in a private house, putting him in the stocks, arresting or forcibly detaining him in the street, is an imprisonment." [*Id.* See also III-129 § 3, 133]

Whereas the rights of security and liberty of movement were "strictly natural," "inherent by nature," "a natural inherent right," [I-134, 129, 130] the right of property, though absolute, was only "*probably* founded in nature," and the existing rules on the subject were "entirely derived from society; and are some of those civil advantages, in exchange for which every individual has resigned a part of his natural liberty." [I-138] (emphasis added) In Book I, Blackstone dealt first with the requirement of due process, meaning legislative authorization, in all taking of private property by the executive. Then in a famous passage, he took up the character of legislative power in this area:

[T]he public good is in nothing more essentially interested, than in the protection of every individual's private rights, as modelled by the municipal law. In this and similar cases the legislature alone can, and indeed frequently does, interpose, and compel the individual to acquiesce. But how does it interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification and equivalent for the injury thereby sustained. The public is now considered as an individual, treating with an individual for an exchange. All that the legislature does is to oblige the owner to alienate his

possessions for a reasonable price; and even this is an exertion of power, which the legislature indulges with caution, and which nothing but the legislature can perform. [I-139]

He went on to derive from the right of property a right of the subject to be exempt from the payment of any *taxes*, "even for the defence of the realm or the support of government, but such as are imposed by his own consent, or that of his representatives in parliament," [I-140] citing the statutes recording the victories of the House of Commons in the struggle against the Crown for the power of the purse. [*Id.*]

Since the private law rules of property were social, rather than natural, Blackstone took them up in Book II. Book III discussed wrongful invasions of property, with the overwhelming emphasis on private invasions. It is only in the short chapter on injuries "proceeding from or affecting the crown" that he returned to the concerns of the chapter on absolute rights. There he explained that the courts restrained the executive power by treating an extra-legal interference with property as a private tort committed by the executive officers involved, and that, in spite of the administrative and discretionary *form* of the proceeding, the judges were bound to disregard even the personal will of the sovereign and render justice according to the existing common law rules. [III-254-57]

There was more to absolute rights than life, liberty and property. "[I]n vain would these rights be declared, ascertained, and protected by the dead letter of the laws, if the constitution had provided no other method to secure their actual enjoyment. It has therefore established certain other auxiliary subordinate rights of the subject, which serve principally as outworks or barriers to protect and maintain inviolate the three great primary rights . . ." [I-140-41] There were five of these:

1. "The constitution, powers, and privileges of parliament; of which I shall treat at large in the ensuing chapter." [I-141]
2. The restriction of the king's prerogative within narrow limits. [*Id.*]
3. The right of applying to the courts and of receiving justice, even in a suit against the king, according to the rules of the common law, as modified by statute, the executive having no power to interfere. [*Id.*]

4. The right to petition the king and parliament, subject only to restrictions laid down by parliament, and which "promote the spirit of peace . . . [but] are no check upon that of liberty." [I-143]
5. The right of the subject "of having arms for their defence, suitable to their condition and degree, and such as are allowed by law. Which is . . . a public allowance, under due restrictions, of the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression." [I-143-44]

The basic approach of the chapter on absolute rights of persons is familiar to us because it is the basic approach of legal thinking in our own liberal mode. Rights exist "naturally." The rational way to secure them is through a state: that is, state powers are necessary if rights are to be protected against *private* invasion. But the very existence of those powers radically reduces the "natural liberty" of man in the state of nature, by introducing practices like capital punishment, imprisonment, and public taking of property. The powers themselves therefore threaten rights with *public* invasion, and must be restrained.

Restraints are of three kinds: (a) There are direct limits on interference with rights, such as the requirement of due process, the "short and limited duration" of suspension of habeas corpus, compensation for takings, and so forth. (b) There are limits imposed indirectly through the rules that define the personnel of the state, here "the constitution of parliament." (c) There are rules about the allocation of powers *within* the state, which function, again indirectly, to protect rights by putting their definition in the hands of those likely to be sympathetic to them. For example, only the legislature can define crimes and punishments, suspend habeas corpus or authorize takings; only the judiciary can try lawsuits.

Blackstone unmistakably intended to assert both that rights could mediate the fundamental contradiction, and that the English constitution *did* mediate it in fact:

And all these rights and liberties it is our birthright to enjoy entire; unless where the laws of our country have laid them under necessary restraints: restraints in themselves so gentle and moderate . . . that no man of sense or probity would wish to see them slackened.



For all of us have it in our choice to do everything that a good man would desire to do; and are restrained from nothing but what would be pernicious either to ourselves or our fellow-citizens. [I-144]

We can even detect the perennial liberal problem of choosing between theories of where rights come from. Blackstone constantly affirmed both the absolute and natural character of rights, and that they could be invaded or "restrained" when parliament saw fit, to promote public safety or convenience. What is unfamiliar about the chapter on absolute rights is its organization, the fragmentary coverage of the subjects it deals with, and the specific choice of emphasis on the problem of executive power. But before we try to interpret these traits, we need a sense of the content of the *relative* rights of persons.

(b) *Relative Rights of Persons*

The organization of Blackstone's discussion of the relative rights of persons was as follows:

*Magistrates*

Supreme magistrates

Legislative = Parliament

Executive = King

Subordinate magistrates (*e.g.* Justices of the Peace)

*People in Public Relations*

Aliens and subjects in relation to the king

The clergy (its internal hierarchy and its relation to the laity)

Nobility and commons

The military

*People in Private Relations*

Master and servant

Husband and wife

Parent and child

Guardian and ward

*Corporations*

Taken as a whole, the treatment of supreme and subordinate magistrates was a small treatise on the organization of the 18th

century English state. The chapter on Parliament described its plenary power, its division into king, Lords, and Commons, the mode of creation of Lords and of election of Members of Parliament, the respective powers of the two houses, the privileges or exemptions of their members from the general law of the land, the procedure for passing laws, and the king's power of prorogation.

In the chapter on the king, we learn of the rules governing the hereditary succession to the throne, the king's councils (not including the Cabinet), his peculiar duties (to govern according to law), his executive powers, and the exemptions from the normal course of law implicit in his "perfection." Blackstone also described the system of royal revenue, dividing it into an "ordinary" part due to the king directly from his subjects, and an "extraordinary" part consisting of taxes raised by act of Parliament. [I-281] Subordinate magistrates were sheriffs, coroners, justices of the peace, constables, surveyors of the highways and overseers of the poor. Under the last heading, Blackstone briefly described the poor law of his time. The essence of this institution was that each English parish raised local taxes to support any indigent person (whether merely unemployed or disabled from working) who had acquired a "settlement" there.

The second broad division of relative rights is more difficult to characterize. These are rights not of "magistrates," but of "persons," but the persons are in "public" rather than "private" relations. The emphasis here was uneven. The chapter on aliens described the special privileges and disabilities of aliens and the qualified character of their relation of allegiance to the king. It also set out the rules of naturalization, and of the more developed relations of allegiance and protection that existed between the king and his subjects. [I-366-75] The chapter on the clergy described the intricate hierarchy of places in the established church, the method of appointment to those places, the system of administration, the privileges and immunities of the clergy, and the rights and duties of the church in relation to its communicants, many of which were fixed by statute. [I-376-95]

The chapter on the civil state described the degrees of nobility in some detail, along with the privileges derived from them, such as membership in the House of Lords and the right to trial by a jury of one's peers in social rank. [I-396-402] Blackstone then more briefly enumerated the ranks of the Commons. These had

nothing like the clear definition of the more exalted ones: "As for *gentlemen*, says Sir Thomas Smith, . . . they may be made good cheap in this kingdom: for whosoever studieth the laws of the realm, who studieth in the universities, who professeth the liberal sciences, and, to be short, who can live idly, and without manual labor, and will bear the port, charge, and countenance of a gentleman, he shall be called master, and shall be taken for a gentleman." [I-406] There were also yeomen, tradesmen, artificers and laborers. *Everyone* fell into one of the total set of ranks, and by a 16th century statute, everyone had to state his rank in any documents filed in a legal proceeding that might lead to outlawry. [I-407] But, below the level of the nobility, there were no special rights, duties, privileges or immunities to distinguish one degree from another.

In contrast to the discussion of the clergy and the "civil state," the discussion of the military contained no description at all of the internal hierarchy of ranks. Odder still, Blackstone began this chapter with the assertion that "the laws . . . and constitution of these kingdoms know no such state as that of a perpetual standing soldier, bred up to no other profession than that of war." [I-408] Standing armies led by professionals were necessary in absolute monarchies, but in a "free" country the only armed body should be the "citizens." It was only because the despotic states of the continent maintained permanent military establishments that England had to follow suit, "for the safety of the kingdom, the defence of the possessions of the crown . . . and the preservation of the balance of power in Europe." [I-414]

Blackstone did not provide a separate treatment in Book III of injuries to the "rights of persons in public relations." Most of what he included in this section was description of hierarchies: sovereign, subject and alien; archbishop, dean, parson, peer; noble, commoner; officer, and soldier. The rules were those for acquiring titles, or administering organizations. Or they were rules defining the ways in which incumbents of particular positions were treated differently (sometimes to their advantage, sometimes not) from other people. For example, the clergy could not hold various civil offices; [I-377] aliens could not own land; [I-374] soldiers could make nuncupative wills. [I-417] A failure to follow one of these rules might lead to a lawsuit, but the suit would take the form of a claim of an injury to some right of person or property defined in the other parts of the work.

The "rights of persons in *private* relations" were quite different. Masters, husbands, parents and guardians had rights to the services of servants, wives and children, and these could be interfered with by third parties, and so give rise to actions for damages or injunction. Book III treated these actions as a special category. There were special writs of trespass for abduction of a wife or daughter, and numerous subdivisions of the action on the case for beating a wife, for criminal conversation, for enticing servants, and so forth. [III-138-43] In general, the chapters on private differed from those on public relations in their emphasis on the reciprocal rights and duties of the parties, and in the rights and duties vis-à-vis third parties that arose from them. What gave *continuity* with the public relations was the extensive description of the gradations of hierarchy, of statutory and common law regimes of regulation of behavior within relationships, and of the peculiar privileges and disabilities that went along with particular roles.

Within each of the four private relations, there was a duty of support from one party and a reciprocal duty of obedience from the other. Masters, husbands, fathers and guardians derived rights of corporal punishment or confinement, and rights against third parties for damages from this primary complex of obligations. The hierarchy within the relation was rarely diadic. Blackstone categorized servants as slaves, menials, apprentices, laborers and executive agents (stewards, factors and bailiffs). [I-423-27] Slavery violated natural law and could not exist in England, though Blackstone seemed to regard a lifetime contract to labor in exchange for support as perfectly legal. [I-424-25] The status of children differed according to whether they were male or female, legitimate or bastards. Guardians were natural, for nurture, in socage, by statute or by custom.

The most striking aspect of the relation of master and servant is the extent to which it was regulated by statute.

All single men between twelve years old and sixty, and married ones under thirty years of age, and all single women between twelve and forty, not having any visible livelihood, are compellable by two justices [of the peace] to go out to service in husbandry or certain specific trades, for the promotion of honest industry . . . . [I-425]

It was not only the "servant" class that was placed under compulsion. "[C]hildren of poor persons may be apprenticed out by the overseers . . . [of the poor] to such persons as are thought fitting;

who are also compellable to take them; and it is held that gentlemen of fortune, and clergymen, are equally liable with others to such compulsion . . . ." [I-426] With respect to laborers, there were statutes

1, Directing that all persons who have no visible effects may be compelled to work. 2, Defining how long they must continue to work in summer and in winter. 3, Punishing such as leave or desert their work. 4, Empowering the justices at sessions, or the sheriff of the county, to settle their wages; and, 5, Inflicting penalties on such as either give, or exact, more wages than are so settled. [I-427]

Specified trades were reserved for workers who had done an apprenticeship of seven years, though the courts had partially eviscerated the statute by holding that "following the trade seven years without any effectual prosecution" was equivalent to apprenticeship. [I-428] A master who had taken on an unemployed worker at the instance of the authorities could not fire him without their permission. [See I-425-26] The courts interpreted an employment contract without a termination date as valid for a year, rather than as a contract at will. [I-425]

Then as now, marriage was also heavily regulated. There were rules about who could marry, about parental consent, and about divorce. There was the fiction of the legal unity of husband and wife. We are less familiar with the intricate set of statutory and common law rules that dealt with children. Indeed, to understand them, we need to imagine a situation in which there were *both* many more children without parents (because of higher mortality among young adults) *and* a much less sharp social distinction between childhood and adulthood. There was a great deal of property administered by guardians, and there was a special, partly statutory, body of rules to control them. The legal "privileges and disabilities" of children were elaborately defined.

The final chapter of Book I was about corporations, distinguished as "artificial" from all the other "natural" holders of rights previously discussed. Blackstone tied the existence of corporations directly to the existence of relative rights of actual persons:

We have hitherto considered persons in their natural capacities, and have treated of their rights and duties. But, as all personal rights die with the person; and, as the necessary forms of investing a series of individuals, one after another, with the same identical

rights, would be very inconvenient, if not impracticable; it has been found necessary, when it is for the advantage of the public to have any particular rights kept on foot and continued, to constitute artificial persons, who may maintain a perpetual succession, and enjoy a kind of legal immortality. [I-467]

Given this rationale, it is not surprising that we reencounter in this chapter many of the institutions dealt with earlier. The primary distinction among corporations was that between sole and aggregate—the king, a bishop, and a parson being sole, while a borough, a trading company, and the dean and chapter of a cathedral were aggregate. A second division was between ecclesiastical and lay corporations, with the latter further subdivided between the civil and the eleemosynary. Civil included boroughs, which sent members to Parliament, performed local governmental functions and engaged in trade. The same category included companies “for the advancement and regulation of manufactures and commerce,” [I-471] which were commercial enterprises often exercising powers we now see as governmental (for example, the East India Company).

Corporations could defend their general or special privileges in court against executive interference—that is, the king could dissolve a corporation only by bringing a legal action against it for “negligence or abuse of its franchise.” [I-485] One of the reasons for their existence was to make it easier for them to resist aggressions against the underlying relative rights, “for, if such privileges be attacked, which of all this unconnected assembly has the right, or ability, to defend them?” [I-468] But Parliament, “which is boundless in its operations,” could dissolve them at will. [I-485]

## 2. *The Oddness of Blackstone's Categorical Scheme*

Taken as a whole, Blackstone's book on the rights of persons presented a remarkably complete picture of English society, economy, and politics. It is true that he relegated most of the material on the legal definition and regulation of property and contract rights to Book II. But he introduced property in general as one of the absolute rights of persons, and fully described marriage and employment contracts in the chapters on private relations. Yet the internal organization of this very full description was peculiar. I want to develop this peculiarity as analogous to that of Blackstone's division of all of law into rights and wrongs.

In Part II of this essay, I argued that the right/wrong dis-

inction was a compromise between an approach based on the medieval forms of action and one based on the modern or liberal notion of the derivation of remedies from rights. The law of wrongs reordered but preserved the writ system so that Blackstone could show that it functioned to implement the law of rights. Here, I want to argue that Blackstone's distinction between absolute and relative rights was likewise a compromise between a medieval and a liberal ordering principle. The law of relative rights reorganized but preserved older categories for describing social life in order to legitimate them in terms of the liberal category of absolute individual rights. The notion of a "relation" played a role in Book I very similar to that of a "wrong" in the *Commentaries* as a whole.

(a) *Private versus Public Law*

To understand this analogy, we need first to see how Blackstone's organizational plan differed from that based on the distinction between private and public law. This distinction is second nature to us, so much so that we rarely advert to it consciously. Indeed, large categorical schemes have been out of fashion for about fifty years; we continue to use unthinkingly that developed by the analytical jurists who domesticated Roman law concepts between roughly 1870 and 1914.<sup>30</sup>

Their approach represented the triumph of the liberal premises in every corner of legal analysis. As we have seen, the essence of liberalism is that it mediates the fundamental contradiction by splitting the universe of others into two opposed domains: one of right-bearing private individuals, and another of power-wielding state officials enforcing those rights. Private law includes all of the rules defining rights of private individuals *inter se*. Public law defines the state, and confines its personnel to the function of protecting rights.

Within public law, we make distinctions corresponding to the political theory on which the state is based. There are rules that guarantee that the state will reflect the popular will through voting and qualifications for office. There are rules defining the internal structure of state powers, based on the distinction between the definition and the enforcement of rights. And there are rules

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30. E.g., W. HOLLAND, *ELEMENTS OF JURISPRUDENCE* (1880); J. SALMOND, *JURISPRUDENCE OR THEORY OF THE LAW* (1902).

that prohibit executive officers and (sometimes) the legislature from taking action that subverts individual rights against the state. Within *private* law, there are rules about torts, contracts, corporations, family law, trusts, and so forth.

These categories are by no means absent from the *Commentaries*. For example, Blackstone sharply distinguished civil from criminal law, on the ground that one concerned only individuals, the other the king as representative of the community. Within the law of civil wrongs, he treated injuries "proceeding from the crown" along with injuries *to* the Crown in a chapter separate from those about injuries of one individual by another. Within Book I on the law of persons, in the section on the public relation of magistrates and people, he treated the state as a whole, including the selection of personnel, the separation of powers, taxation, and the organization of the bureaucracy of the executive branch. Throughout the work, moreover, Blackstone constantly distinguished legal rules about relations between private individuals from those about relations within the state and those governing state-individual conflicts.

Nonetheless, he was no more like an analytical jurist in his treatment of substantive law than in his treatment of the relationship between rights, procedure, and remedies. The public/private distinction was not *the* main ordering principle, but a distinctly subordinate one within the categories of absolute and relative rights. Within the chapter on absolute rights, as we have seen, there is an indiscriminate mixture of rules about private injuries to life, liberty and property with rules about executive and legislative invasions. Sometimes the same sentence lists private and public law rules together as derivations from the general concept being discussed, as in the case of false imprisonment. [I-136] Moreover, the various descriptions of state-individual conflict contain many seemingly almost random references to the internal organization of legislative, executive, and judicial powers, a subject that received a fuller discussion in the section on the relative rights of magistrates.

The impression of chaos would be even stronger had Blackstone not treated the law of things in a separate Book. The law of things dealt almost exclusively with private law rules about tort, property and contract. It was loosely derived from the absolute right of property, and might have been appended to the discussion of that right in the same way that the discussion of private false



imprisonment was appended to the discussion of personal liberty. Blackstone refused to include property rules in the first chapter, not because they were *private*, but because their particular provisions were largely "social," rather than "natural."

The law of relative rights also included both public and private law rules, although not in the indiscriminate mixture of chapter one on absolute rights. Blackstone treated the state as an entity apart, and he explicitly identified the relations of master and servant, husband and wife, parent and child, and guardian and ward as "private," and dealt with them together. Yet what we think of as public law was only one of two divisions within the more general category of "public relations," the other being that of "persons" (as opposed to "magistrates") in public relations. This procedure was highly inconsistent with the public-private distinction.

Persons in public relations were aliens and subjects in relation to the crown, the clergy in relation to the laity and to one another, the nobility and commonality, and the military. *Some* of the incidents of these various social positions fell within public law, as for example, the participation of peers and spiritual lords in the upper house, or the official duties of the military. They were a part of the general body of rules defining the organization of the legislative and executive branches. But others had to do with the private law rules of "status," defining the special rights, duties, privileges, and disabilities of aliens or clergymen in relation to other private individuals.

From all of this, we can conclude that Blackstone was perfectly able to distinguish public from private law rules when it suited his purposes, but that his purposes usually led him not to do so. In the chapter on absolute rights, his dominant concern was to enumerate and describe life, liberty and property as abstractions derived from the state of nature. Since the abstract rights manifested themselves in public and private law rules, he included so much of each as served to illustrate the abstractions, without bothering to completely describe or carefully distinguish the two types of law.

In the law of relative rights, Blackstone was primarily interested in presenting English society as a set of hierarchies of persons. Each hierarchy had a function, and each was composed of complex social roles heavily regulated by common law and statute. Two of the hierarchies—that of Parliament and that of

the Crown and its officers—had the function of exercising the powers of the state, and Blackstone identified them as public. At the other extreme, there were the “domestic” or “economical” hierarchies of employment and family. As with the state hierarchies, Blackstone described these in terms of clusters of legal rules all related to the functions and ranks of the people involved, but here those were private, and he so identified them. In the middle were *people in public* relations, with some private and some public functions.

Thus the state-individual distinction determined the arrangement of roles—public-mixed-private—but did not influence the internal organization of the discussions of particular roles. Blackstone freely mixed the public and private law elements whenever both were present. This occurred in the treatment of corporations as well as of the clergy, nobility, and so forth. The primary categorization of corporations—into sole and aggregate; ecclesiastical and lay; and civil and eleemosynary—made no reference to the public-private distinction. Blackstone used that distinction only implicitly: in giving examples of each corporate type he tended to include some that we now see as public, some we see as private, and some, for example, trading companies, that defy categorization one way or the other. In the discussion of the revocation of charters, he merged the “federalism” issue of borough autonomy with the “vested rights” issue of security for private property holders. [I-485]

### (b) *The Medieval Ordering*

It seems a promising hypothesis that the oddness of Blackstone's scheme had something to do with the survival of earlier ways of ordering legal phenomena. But, exception made for Hale's brief “*Analysis*,”<sup>31</sup> it is difficult to find early examples of synthetic work comparable to the *Commentaries*. Glanvill and Bracton,<sup>32</sup> for example, put the overwhelming emphasis on the catalogue of forms of action, busily working to provide a basis for Maine's famous phrase about substance secreted in the interstices of procedure.<sup>33</sup>

Maitland, in his *History of English Law*, tried to figure out

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31. See note 12 *supra*.

32. I F. POLLOCK & F. MAITLAND, *supra* note 15, at 229-30.

33. H. MAINE, *DISSERTATIONS ON EARLY LAW AND CUSTOM* 389 (1883).

how the medieval commentators *would have* organized the body of substantive rules had they not been able to rely on the writ system. He began with "that division of the law into 'public' and 'private' which seems eminently well suited to be among the first outlines of any institutional work on modern law." He continued:

Bracton knew of the distinction and could notice it as a matter of scholastic learning; but he makes little use of it. He could hardly have used it and yet dealt fairly with his materials. Feudalism, we may say, is a denial of this distinction. Just in so far as the ideal of feudalism is perfectly realized, all that we call public law is merged in private law: jurisdiction is property, office is property, the kingship itself is property; the same word *dominium* has to stand now for *ownership* and now for *lordship*. . . . Any such conception as that of 'the state' hardly appears on the surface of the law; no line is drawn between the king's public and private capacities, or it is drawn only to be condemned as treasonable. The king, it is true, is a highly privileged as well as a very wealthy person; still his rights are but private rights amplified and intensified. . . . Certainly it would be easy for us to exaggerate the approach made in any country . . . to the definite realization of this feudal ideal; but just in so far as it is realized, 'public law' appears as a mere appendix to 'real property law' modified in particular cases by a not very ample 'law of persons.'<sup>34</sup>

The notion of public law as a mere appendix to real property law is that of a hierarchy of vassalage or allegiance. One derived from a place in this hierarchy not only a limited right to control of particular real estate, but also "jurisdictional" subordination to those above and superiority to those below. The "not very ample" law of persons "modified" this scheme because it meant that some people had roles or statuses (monk, clergyman, nobleman, outlaw, freeman, king) that were defined independently of the general rules of the system of tenure. The "rights" of persons in these roles were badges of distinction: They set an individual or a corporate group apart from the mass of "the unfree," and also from the other orders of persons, rather than representing the "natural" unity and equality of all persons.

We can find a good deal of this in Blackstone. First and most striking, his list of persons in relations is very similar to Maitland's list of the "sorts and conditions of men."<sup>35</sup> Second, we have seen already that these "relations," like Maitland's "conditions," were

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34. 1 F. POLLACK & F. MAITLAND, *supra* note 15, at 230-31.

35. *Id.* at xiii-xv.

by nature neither public nor private (though they might be sub-categorized as either, or as both at once). Finally, Blackstone sharply separated the law of property from the law of persons in statuses or roles that set them apart from the general course of law.

Yet it is just as easy to identify ways in which Blackstone's scheme deviated significantly from that which Maitland thought would have seemed "natural" to Bracton. The first point of distinction is this: In the feudal ordering, the law of real property was the primary locus of the fusion of public and private law ("our land law has been vastly more important than our law of ranks"<sup>36</sup>), whereas in Blackstone the primary locus of fusion was the law of persons. Blackstone's law of things was predominantly concerned with nongovernmental relations among private individuals. There were forms of property still admixed with jurisdiction (for example, "offices" and tithes), but these, as we will see, were a limited class of "incorporeal hereditaments." Parliament and the courts had progressively abolished the hierarchy of tenurial obligations that was the backbone of the medieval system. The sharp separation of personal rights from rights over things was important to Blackstone, but for reasons that would have had no application 400 years earlier. Public law was an "appendix" to the law of status rather than to that of real property.

The second way in which Blackstone was "non-feudal" was in his division of the law of persons into absolute and relative rights. This involved him in some contortion. Why not include the absolute rights of Englishmen in the discussion of the personal relation of sovereign and subject? Hale<sup>37</sup> had proceeded in precisely this fashion: after distinguishing personal rights from property rights, he listed the personal, beginning with the king and his subordinate magistrates (among whom he counted the clergy); went from there to the "normal" free individual, with the trinity of rights of life, liberty and property and the duty of allegiance; and finished with the "exceptional" statuses, within which he included the nobility, and the private relations of master and servant, husband and wife, and so forth.

Blackstone preserved continuity with the earlier approach by placing the subject in the hierarchy of persons after aliens and before the clergy. But he *also* singled out the abstract individual right bearer for separate treatment in the initial chapter on ab-

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36. *Id.* at 408.

37. See note 12 *supra*.

solute rights, identified those rights with "nature," and categorized all the remaining relative rights as subordinate or "posterior" to the natural ones. [I-124] In the feudal order, the free individual may have been the norm with respect to which all other statuses or conditions were exceptional,<sup>38</sup> but in Blackstone the rights of the free individual were *universal*, and all other rights were "modifications" thereof.

The chapter on absolute rights included both rules about conflicts among individuals and rules about individual conflicts with the state, thereby disregarding the distinction between public and private law. But the very notion of absolute rights of individuals also violated the medieval principle of *fusion* of public and private law. Blackstone described the abstract individual in the state of nature, and the abstract bearer of absolute rights within society, as possessing life, liberty and property, but without any *power of jurisdiction* attaching to any of those rights. Likewise, his only *duty* was to "pay obedience to the will of the whole," to "submit to the laws of the community; without which submission of all it was impossible that protection should be certainly extended to any." [I-48]

Since the tenurial system of obligation had been abolished,<sup>39</sup> the individual right bearer acquired no *public* powers or obligations by property ownership, any more than he did by possession of the absolute rights of personal security and free locomotion. In other words, the primary legal actor, the unit on which Blackstone built the rest of his system, was a genuine *private individual*, rather than a "person" with an "estate." Furthermore, "the principal aim of society," and the "first and primary end of human laws" was to "maintain" and "regulate" his strictly private rights. [I-124]

The third way in which Blackstone was unfeudal was in his treatment of the state. A modern reader not equipped with Blackstone's analytical table might feel quite at home in Book I until reaching chapter four, on "the king's royal family." Chapter one dealt with the absolute rights of an abstract individual, chapter two with the absolute powers of an abstract sovereign legislature, and chapter three with the king as a supreme executive officer strictly bound by the rule of law. While the discussion of the

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38. 1 F. POLLACK & F. MAITLAND, *supra* note 15, at 407.

39. See Part IV (B)2 (a) *infra*.

prerogatives of the queen consort might seem odd, there would be nothing more to wonder at through all the chapters on taxation, foreign affairs and subordinate magistrates, until, finally, the chapters on aliens and the clergy woke one up to the fact that the state and its officers were a small subdivision of the law of relative rights of persons, rather than the public law counterpoise to the absolute rights of private individuals.

In other words, although Blackstone *placed* the state within the hierarchy of the law of persons, there was practically nothing in his *treatment* of it once placed to suggest a fusion of property and jurisdiction. Indeed, he constantly and strenuously affirmed its impersonal and fully public character, its careful restriction to serving the interests of the community of right bearers rather than of those who happened to hold office within it. The king was not the medieval "owner" of the realm, but the "executive" protector of rights against foreign or domestic aggression. Parliament was neither a royal council, nor (except occasionally) a court, nor a union of estates mirroring the social organization of the kingdom. It was the "legislature," whose function was to make laws for the definition and safeguard of the individual rights that justified its existence.

(c) "*Relation*" as a *Compromise*

To begin with the absolute rights of individuals, grounded in nature and equal for all men, and to justify the state in terms of the protection of those rights, was to be a liberal. But to treat the privileges of the nobility, the established church, and a standing army—not to speak of the state-reinforced superiority of masters, husbands, and fathers over servants, wives, and children—as *continuous* with the state was to reject liberalism. The whole was a compromise. The basis of the analysis was a world of private individuals with equal rights. On this base Blackstone constructed *both* the state as an abstract, power-wielding protector of rights, *and* the characteristic legal institutions of pre-liberal society.

He was willing to extract the "freeman" from his place in the medieval order of ranks, and to precipitate the state from the combination of king and Parliament. But he was unwilling to fuse the private economical relations with property into a general category of private law, or to split up each of the intermediate institutions of nobility, church, and military, and distribute their

parts into one box or the other. Through the notion of a "relation," he subordinated all the legally enforced social hierarchies of his day to the absolute rights of private individuals, and yet preserved each as an autonomous and internally coherent unit of analysis within the general scheme of law.

B. *The Absolute/Relative Distinction as a Legitimator of the Status Quo*

The intention lying behind Blackstone's construction of the category of relative rights of persons was to make it possible to justify the state's role in maintaining hierarchies within civil society. As with the right/wrong distinction, Blackstone intended to refute a set of liberal criticisms of the English constitution. These criticisms had to do both with the public law rules about the composition and internal organization of the state, and with the way in which state power was used to regulate the interaction of private individuals. In this section, I will, first, describe the liberal critique; second, I will describe Blackstone's general strategy of response; and third, the specific arguments from "convenience" and "implied consent" by which he defended each of the problematic institutions of hierarchy.

1. *The Liberal Critique*

Liberalism is a way of thinking about the fundamental contradiction, a way of thinking that begins with rights and constructs the state and its powers as a means to their protection. Liberalism is *not* a set of logical deductions from premises. As we have seen already, liberal thinkers reproduce within it the contradiction it is supposed to resolve. For example, different strands embrace different theories about the origins of rights, some emphasizing the absolute power of the collectivity to fashion and refashion them at will, others emphasizing their "natural," universal and unchanging character. While mediation by the rule of law, that is, by appeal to rights, is a premise for all liberal thinkers, some see this as implying the power of judges to reason directly from principles to particular results. Others see the judge as the mere executor of specific rules laid down by the right-defining body.<sup>40</sup>

From the beginning, liberal thinkers have felt that their

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40. See text accompanying notes 23-24 *supra*.

premises had implications concerning two substantive issues: that of the organization of the state and that of how far the state can differentiate by law among the mass of individuals whose rights it protects. But, again, the fact that *they thought* they were drawing conclusions from premises through neutral processes of deduction does not mean that this was in fact the case. It is often difficult to keep this in mind, and especially so when we confront those liberal slogans that have been a matter of consensus among liberal theorists. Here we have to deal with two of these: the impersonality of power and the equality of right.

(a) *The Impersonality of Power (Public Law)*

Rights mediate the fundamental contradiction because they allow their bearers to fuse with others without being annihilated by them. First, we fuse with others in the state by exercising our public law rights (of voting and holding office). Second, we fuse with them in civil society on the basis of mutual respect for private law rights (of property, contract, and so forth). The slogan of impersonal power means that the rules governing fusion through the exercise of public law rights should not deform the process by permitting some individuals to dominate others within it.

The implications of the general maxim of impersonality have seemed, at various times and places, as plain as they could be. Sometimes the maxim requires, but sometimes it prohibits direct democracy. Sometimes it requires, but sometimes it prohibits, representative democracy. Sometimes it leads ineluctably to constitutional monarchy, sometimes to republican or other anti-majoritarian arrangements, but sometimes it forbids them. Sometimes it has seemed that the idea of popular sovereignty was implicit in the idea of rights, and that where it existed it legitimated of its own force any structure of particular powers the people had approved. But this merely transfers the issue of domination or impersonality to another level, that of argument about what arrangements the people *ought to* approve.

For our purposes, it is enough to say that *in 18th century England* a belief in rights as a mediator made the existing system of government problematic.<sup>41</sup> There were three aspects of the

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41. See generally C. ROBBINS, *THE EIGHTEENTH CENTURY COMMONWEALTHMAN* (1959); B. BAILYN, *THE ORIGINS OF AMERICAN POLITICS* 41-45 (1967); see also Katz, *supra* note 5, first essay.



state that were arguably inconsistent with the liberal premises about the derivation of powers from rights. The first was the hereditary and therefore quintessentially personal character of the king's executive power. The second was the legislative power of king, nobility and clergy; and the third was the mode of election to the House of Commons.

Kingship was problematic on two grounds. Its proprietary character was a denial of access to the state; it meant that the private right holder could fuse with others only on terms of inequality. Second, the personal character of the right-enforcing power posed a danger to the very rights that justified its existence. The king had interests that set him apart from the rest of the populace *along with* the special means to further them afforded by a privileged access to the use of violence.

Much the same analysis applied to the legislature. The legislative roles of king, nobility and clergy denied access to mere private right-holders, by reducing their role in the definition of rights. It also created the danger that the particular interests of these three social orders would distort the process of defining rights. Their formal recognition within the state might well allow them to sustain themselves where, under a regime of equal access to power, they would simply wither away. The role of the liberal state was to guarantee rights and then let each individual make what he could of their exercise. By contrast, the system of mixed government seemed to declare itself a partisan of those who possessed the arbitrary distinction of royal or noble birth, or clerical office within the established church.

As for the House of Commons, there were limitations on suffrage, and property qualifications for office. The exclusion of women was taken so much for granted that Blackstone didn't even mention it. The House was composed of representatives of the "knights of the shires" and of the boroughs. To vote in a shire, one needed a freehold worth 40 shillings a year. [I-172] The boroughs chose their representatives according to the provisions of their municipal charters, and these were of every imaginable description. Some boroughs had no or few inhabitants, others many tens of thousands; some had oligarchical governments that permitted a half dozen officials to select the member; others had adopted one or another mode of election by the residents at large. The national election law required anyone elected from a borough to have

landed property worth £300 per annum "which somewhat balances the ascendant which the boroughs have gained over the counties, by obliging the trading interest to make choice of landed men." [I-176]

The problem with all of this arose from the notion that the House of Commons was "the democratical part of our constitution," and "in a democracy there can be no exercise of sovereignty but by suffrage, which is the declaration of the people's will." [I-170] If legislative power was created to define and protect the rights of all, and if the theory of the House was that such a power should be entrusted in part to those for whose benefit it existed, then one needed an explanation of why so many private individual right bearers were excluded.

One might sum up the liberal objections to the system of mixed government as follows. It was irrational and unjust to place state powers in the hands of people who were distinguished from the mass of individual right-bearers by birth, religion, or ownership of specific types and quantities of property. It was irrational because people so distinguished had particular interests that were likely to conflict with the general interest in the preservation of rights. It was unjust because it denied access, and because it allowed the distinguished groups to maintain their existing positions of advantage within civil society at the expense of those not distinguished.

#### (b) *Equality of Rights (Private Law)*

The slogan of equality of rights means that the right-defining process, which is what allows a liberal mediation of the fundamental contradiction, must not make distinctions which lead to the domination of some private individuals by others. There is a sense in which "equality of rights" is the other side of the coin of "impersonal power." Impersonality means that the state should not *reflect* the arbitrary distinctions of civil society, while equality means that the state should not *create* such distinctions, or amplify them when their existence is inescapable.

As with the slogan of impersonality, it is crucial to recognize from the beginning that liberal theorists do not *deduce* conclusions about specific private law issues from the notion of equality. Indeed, they fluctuate constantly between two interpretations

that lead to diametrically opposed results in particular cases (that is, they reproduce the contradiction within the mode of thought intended to mediate it). On the one hand, there is the notion of formal equality; on the other, there is that of adjusting the definitions of rights to take account of obvious or subtle differences in the capacities or characters of particular classes of right bearers. Just as positivism and natural rights, judicial passivism and judicial activism, and direct democracy and republicanism are conflicts *within* liberalism, so also is that between formal legal equality and substantive equality of outcomes achieved through formal inequality.

Thus the idea of equality of right sometimes requires but sometimes prohibits the differentiation of children and adults, men and women, blacks and whites, merchants and consumers, bastards and legitimate children, "professionals" (doctors, lawyers and clergymen) and laymen, bosses and workers, "loyal" and "disloyal" citizens, corporations and natural persons, landowners and the landless, property owners and the propertyless, and so forth. The argument for differential legal treatment may emphasize substantive equality as an end in itself, or resort to the strategy of "exceptions," justifying distinctions by pointing to natural or artificial advantages that render the outcomes of a regime of formal equality unfair in its own terms.

As with the slogan of impersonal power, that of equality of rights has *some* meaning despite its vagueness. It serves to focus and structure argument in a way that rendered the particular legal rules Blackstone grouped under "people in public relations" and "private relations" no less problematic than the rules about the "relation of magistrates and people." Indeed, we have seen that the main subject of all of these sections was a set of legally defined hierarchies that placed one person over another, while distinguishing both of them, through the associated privileges and disabilities, from the general mass of subjects.

Of course, we need to distinguish the very general modern critique of legal inequality from that of 18th century liberalism. For us, it may be "obvious" that opposition to kings, nobles, and an established church is of a piece with opposition to the legal subjection of women, children, and "servants." But it seems likely, as we will see, that Blackstone thought he was strengthening rather than weakening the case for the aristocracy and the clergy by as-

sociating it with the case for the father's right to visit other family members with "moderate" physical punishment.

(c) *The Confusion of Property and Jurisdiction*

I have presented the substantive liberal critique in terms of the liberal categories of public and private law. Such a procedure is distorting precisely because the liberals were criticizing a single set of institutions, first in their public and then in their private aspect. The arguably illegitimate distinctions formally recognized in the public law rules about kingship, the House of Lords and the House of Commons reappear in the private law discussion as the objects of arguably illegitimate distinctions among private individuals. The different bearers of relative rights—king, nobility, clergy, commons, and even corporations—combine in Parliament; they also arrange themselves as the distinct orders or hierarchies of the private sphere of civil society. The state errs by simultaneously reflecting and creating *the same illegitimate* distinctions.

The whole of the liberal critique was thus more than the sum of its public and private parts. The conceptual disentangling of property and jurisdiction was an aspect of the development of a radical program, a program that called for the disestablishment of the social orders that constituted English society.

In Blackstone's time, a good deal of this program had already been accomplished. The abolition of feudal tenurial obligation meant that there was no hierarchical rank below that of freeman; the system of manorial courts which had simultaneously administered the lord's property and dispensed his justice were no more; the guilds had vanished, along with their combined power/right of managing production and managing the towns.

The nobility as such (dukes, earls, viscounts, barons) had never been extensively established, but it retained both the legislative peerage and the right to trial by a jury of one's peers. At the other extreme, the church existed in a form that virtually merged state and civil society. On the one hand, it benefited from laws against rival sects, from the legal duty of support by all parishioners, from lands granted by the Crown to endow parishes, and from royal patronage generally. Its highest officials participated in the national legislature, and its courts exercised legal authority over a wide range of important issues, such as marriage, divorce, and

aspects of inheritance. It was subject to intensive state control, by Parliament at the level of doctrine and in the fixing of duties to parishioners; by the Crown through nomination for church offices and the oversight of administration.

Yet the church was at the same time a strikingly private institution. A parson was a corporation sole, with property in his office and a freehold interest in the parish lands and buildings. That same parson might be indebted to a benefactor who had purchased for him from a third person the private property right, called an advowson, to nominate or "present" for that particular parish. [I-388-89]

Establishment was an enormously plastic institution, and the nobility and the clergy represented only the extremes. Borough corporations, trading companies and chartered colonies were intermediate cases, each exercising a combination of public powers and private rights, heavily controlled at one level by the state and yet "owned" by individuals at another. The king himself was "established" in this sense, and so was the military, since officers had property rights in commissions they might have purchased but could not sell.

The landed gentry and the commercial classes were not formally recognized, but the property qualifications for voting, holding national or local office, sitting on juries, and even fox hunting all distinguished them from the lower ranks of commoners. [I-352; III-356, 362] The House of Commons consisted of the "landed interest of the kingdom," and the "trading interest." [I-172, 174] As for the poor, they were the object of a negative version of the same general mode of social organization: they had their right to support at the public expense, but were also formally excluded from government, legally obliged to work, and distinguished for particularly cruel treatment in all areas of criminal law. A person with property was a "gentleman" by virtue of living idly; a person of no property became by the same conduct a criminal "rogue" or "vagabond." [IV-169]

## 2. *The Strategy of Legitimation*

The distinction between absolute and relative rights permitted Blackstone to preserve the conceptual integrity of each of these establishments and yet to respond to the liberal critique in

its own terms. He *might* have affirmed that the division of civil society into a set of legally reinforced hierarchies, reflected in the state, was legitimate because the hierarchies were natural and necessary in themselves. He might have denied the liberal premise of natural rights of persons, or denied their relevance to understanding the organization of an actual society. But he did none of these things. He aimed to legitimate the merger of the state with civil society by appeal to the very premises that made it problematic. He extended and developed liberal theory to make it serve his legitimating purpose rather than rejecting it as wrong or irrelevant. In the process, he was quite willing to admit that there were imperfections in the existing order of things, so long as the whole, the architecture of the system, emerged unscathed.

Thus he conceded that "if any alteration might be wished or suggested in the present frame of parliaments, it should be in favour of a more complete representation of the people." [I-172] As for the poor laws, "notwithstanding the pains that have been taken about them, they still remain very imperfect, and inadequate to the purposes they are designed for: a fate that has generally attended most of our statute laws, where they have not the foundation of the common law to build on." [I-365] As with the law of wrongs, Blackstone was always willing to concede the existence of problems so long as he could displace the blame onto Parliament.

A more subtle and more important variant of the strategy of blaming Parliament was to argue that it was precisely the modernization of the state apparatus that made the traditional institutions dangerous to liberty, in spite of all the reforms designed to bring that apparatus under legislative control. For example, under the old regime, the king had possessed a proprietary right, independent of Parliament, to a large number of specific sources of revenue. "[F]ortunately for the liberty of the subject, this hereditary landed revenue, by a series of improvident management . . . [had] sunk almost to nothing . . ." [I-306] This development, along with the numerous reforms of the 17th and early 18th century, might lead one to think "the balance is inclined pretty strongly to the popular scale, and that the executive magistrate has neither independence nor power enough left to form that check upon the Lords and Commons which the founders of our constitution intended." [I-334]

But this impression, Blackstone conceded, would be a false

one. The new, fully public, statutory systems of revenue and national debt "being placed in the hands of the crown, have given rise to such a multitude of new officers created by and removable at the royal pleasure, that they have extended the influence of government to every corner of the nation." [I-335] At the same time, there had come into existence "another newly acquired branch of power; . . . not the influence only, but the force of a disciplined army: paid indeed ultimately by the people, but immediately by the crown: raised by the crown, officered by the crown, commanded by the crown." [I-336] In short, "whatever may have become of the *nominal*, the *real* power of the crown has not been too far weakened by any transaction in the last century." [I-337] Rather, those transactions had "thrown such a weight of power into the executive scale of government as we cannot think was intended by our patriot ancestors, who gloriously struggled for the abolition of the then formidable parts of the prerogative." [I-335]

We have seen already that the basic distinction between absolute and relative rights was that the former derived from nature, while the hierarchies of the latter governed "things in themselves indifferent" according to the will of the sovereign. When we combine this concession with Blackstone's criticisms of the public law institutions of his time, it is at first difficult to understand the source of his reputation as a toady. It is nonetheless richly deserved. In his introductory chapter, "persons of inferior condition" contrast sharply with "those on whom nature and fortune have bestowed more abilities and greater leisure. . . ." "[G]entlemen of independent estates and fortune, the most useful as well as considerable body of men in the nation" should be particularly interested in law because they serve on juries, as justices of the peace, and in Parliament. [I-7-9]

The nobility had a further motive for legal study since the House of Lords was the highest court of appeal. This trust in the nobility was justified, among other reasons, "because the founders of our polity relied upon that delicacy of sentiment, so peculiar to noble birth." [I-12] The chapters on the king are full of slavish expressions of respect for George III, of which the most striking follows directly on the discussion of the paradoxical expansion of royal power through the very reforms designed to limit it. Blackstone expressed the hope that the reduction of the national debt

and peace in Europe would diminish that power in the course of time. Meanwhile the best he had to offer was the

hope that we may long, very long, continue to be governed by a sovereign, who, in all those public acts that have personally proceeded from himself, hath manifested the highest veneration for the free constitution of Britain; hath already in more than one instance remarkably strengthened its outworks; and will, therefore, never harbour a thought, or adopt a persuasion, in any the remotest degree detrimental to public liberty. [I-337]

Blackstone's attitude toward hierarchy, and his strategy for legitimating it, were both highly ambivalent. He combined enthusiastic constitutionalism with enthusiastic respect for authority:

The most stable foundation of legal and rational government is a due subordination of rank, and a gradual scale of authority; and tyranny also itself is most surely supported by a regular increase of despotism, rising from the slave to the sultan: with this difference however, that the measure of obedience in the one is grounded on the principles of society, and is extended no farther than reason and necessity will warrant: in the other it is limited only by absolute will and pleasure, without permitting the inferior to examine the title upon which it is founded. [IV-105]

By grouping the various hierarchies together and opposing them to absolute rights, Blackstone made it possible to develop two arguments: First, each hierarchy served rather than undermined absolute rights. Second, the holders of absolute rights had "impliedly consented" to their existence. Given these two arguments, there was no more than an appearance of contradiction in a *liberal* fusion of state and civil society.

### 3. *The Derivation of Relative from Absolute Rights*

The peculiar force of this strategy depended on preserving the analogy between all the kinds of relative rights. Thus the relation of a sovereign Parliament to right-bearing citizens is a model for that of nobles and commoners, which in turn shares the same form with that of parent and child. Conversely, the legitimacy of the authority of the father is available to buttress that of the parson over his parishioners, and that of the king over his subjects. Thus we will see both the argument from "convenience" and that from "implied consent" played all up and down the scale of hierarchy.



(a) *Hierarchy as "Convenient" for Securing Rights*

The argument from convenience begins with the state itself, which demands an obedience from all right holders "without which submission of all it was impossible that protection should be certainly extended to any.

For when civil society is once formed, government at the same time results of course, as necessary to preserve and to keep that society in order." [I-48. *See also* I-125, 251; IV-110] The state's power of making laws

may be discovered from the very end and institution of civil states. For a state is a collective body, composed of a multitude of individuals, united for their safety and convenience, and intending to act together as one man. . . . But, inasmuch as political communities are made up of many natural persons . . . these several wills cannot by any *natural* union be joined together . . . . It can therefore be no otherwise produced than by a *political* union . . . . [I-52]

We saw in Part II that both the division of state power among king, Lords, and Commons, and its division between legislative, executive, and judicial branches, were calculated, through checks and balances, for the preservation of liberty. [I-49-52, 146, 154-55, 269] This is a pure form of the argument from convenience, but it is sufficiently familiar so that we don't need to run through it in detail. Rather, we need to focus on the claim that each of the aspects of mixed government the liberals found problematic could be justified by the same recourse to the necessity of protecting rights. Blackstone's justification of limitations on suffrage can serve as a model for all the rest. He conceded that "[i]f it were probable that every man would give his vote freely and without influence of any kind, then, upon the true theory and genuine principles of liberty, every member of the community, however poor, should have a vote in electing those delegates, to whose charge is committed the disposal of his property, his liberty and his life." [I-171] Unfortunately, there were persons "in so mean a situation that they are esteemed to have no will of their own." Their exclusion furthered rather than restricting liberty because it reduced the power of "a great, an artful, or a wealthy man" to influence elections. [*Id.*]

Blackstone advocated a "due medium" on the issue of character of the kingship. He approved of the Revolution of 1688, in which Parliament had declared the throne "vacant" as a step in

the selection of a new king, but passionately disapproved of the execution of Charles I and the Commonwealth. The existing English constitution, as he understood it, permitted Parliament to replace the king if he forfeited his rights by abusing those of the people. This solution was implicit, and Blackstone thought it "became him" to remain "silent" about the details, though praising the existing situation in a general way.

The extremes, between which it steers, are each of them equally destructive of those ends for which societies were formed and are kept on foot. Where the magistrate, upon every succession, is elected by the people, and may by the express provision of the laws be deposed (if not punished) by his subjects, this may sound like the perfection of liberty, and look well enough when delineated on paper; but in practice will be ever productive of tumult, contention, and anarchy. And, on the other hand, divine indefeasible hereditary right, when coupled with the doctrine of unlimited passive obedience, is surely of all constitutions the most thoroughly slavish and dreadful. [I-217. See also I-192-96, 211-13, 245, 251]

With respect to the particular powers of the Crown, Blackstone set out to show that they were "necessary for the support of society; and do not entrench any farther on our *natural* liberties, than is expedient for the maintenance of our *civil*." [I-237] In foreign affairs, the justification of royal power was that it is "impossible that the individuals of a state, in their collective capacity, can transact the affairs of that state with another community." [I-252] As for the command of the armed forces, "[t]he great end of society is to protect the weakness of individuals by the united strength of the community: and the principal use of government is to direct that united strength in the best and most effectual manner to answer the end proposed. Monarchical government is allowed to be the fittest of any for this purpose: it follows therefore, from the very end of its institution, that in a monarchy the military power must be trusted in the hands of the prince." [I-262]

The House of Lords was the "aristocratic" element in the government, "selected for their piety, their birth, their wisdom, their valour, or their property." [I-50-51] Their function was to provide "circumspection and mediatory caution" to the legislative process of defining and safeguarding rights. [I-51] "The distinction of rank and honours" was "necessary in every well governed state," for three reasons. It encouraged "emulation, or virtuous ambition" among the citizenry. [I-157] It "create[d] and pre-

serve[d] that gradual scale of dignity, which proceeds from the peasant to the prince; rising like a pyramid from a broad foundation, and diminishing to a point as it rises. It is this ascending and contracting proportion that adds stability to any government; for when the departure is sudden from one extreme to another, we may pronounce the state precarious." [I-158] And "[i]t is impossible that government can be maintained without a due subordination of rank; that the people may know and distinguish such as are set over them, in order to yield them their due respect and obedience." [I-271. *See also* IV-105]

With respect to the Church, "[d]oubtless the preservation of christianity, as a national religion, is, abstracted from its own intrinsic truth, of the utmost consequence to the civil state." [IV-43. *See also* IV-103] Given establishment, "it seems necessary for the support of the national religion, that the officers of the church should have power to censure heretics." [IV-49] It also followed that it was a statutory crime to "deny any one of the persons of the holy Trinity to be God," or to "[revile] the ordinances of the church." [IV-49-50] (emphasis deleted). We have seen already that a standing army was justified only because "judged necessary" in light of continental practice. "However expedient," in time of war, martial law could be relaxed in peacetime without "much inconvenience." [I-415] Impressment was "only defensible from public necessity, to which all private considerations must give way." [I-420]

The relation of master and servant was also "founded in convenience." [I-422] Blackstone offered the following analysis of the rule reserving certain trades to those who had done an apprenticeship: "At common law every man might use what trade he pleased; but this statute restrains that liberty . . . the adversaries to which provision say, that all restrictions, which tend to introduce monopolies, are pernicious to trade: the advocates for it allege, that unskilfulness in trade is equally detrimental to the public as monopolies." The official attitude toward the statute varied "according to the prevailing humour of the times." [I-427]

The relation of husband and wife was "founded in nature but modified by civil society." [I-422] The principal modifications were: limits on the right to marry, violation of which the courts viewed as "a civil inconvenience" [I-433,435-36]; prohibition of divorce, because if divorce were easy it "would probably be extremely frequent" [I-441]; and the legal identity of husband and

wife, which has "no foundation in nature" but is based on "the purposes of civil society." [I-55] The power of parents over children and the distinct disabilities of bastards were likewise social constructions. [I-452, 455] Guardianship was "artificial parentage" [I-422] and corporations, likewise artificial, were created "for the advantage of the public." [I-467] Thus we can say that every one of the hierarchies of the relative rights of persons was explained, to one degree or another, by appeal to the notion of convenience. "A is necessary to B," "B is impossible without A," or "A follows from the purpose of attaining B," were all ways of linking those hierarchies back to the absolute rights of persons. They allowed Blackstone to begin with equality in the state of nature, conceding the fundamental liberal premise, and then to construct on that basis an artificial civil society riddled with *inequality*.

(b) *The Implication of Consent to Hierarchy*

The notion of an "implied consent" or "implied contract" between right holders played a role in many different parts of the *Commentaries*. In the discussion of relative rights, Blackstone used it as an alternative to the argument from convenience, in order to justify hierarchy by appeal to those same absolute individual rights that seemed to render hierarchy problematic. The great advantage of implication, in this as in other contexts, was that it was manipulable.

In its simplest form, implication was a way to justify an interpretation of the will or intention of some legal actor. In lay terms, it was the imputation of an intent on the basis of a notion of what the actor *would have* done in the circumstances, in spite of the absence of any direct expression on his part. Then, as now, the problem in such a procedure is that the courts have to impute some set of goals and attitudes, a "character" for the actor, before they can decide what he "would have" done. It is a commonplace observation that in so doing they import both their conventional notions of how average people really do behave *and* their notions of how people *ought* to behave.

In his discussion of the private law doctrine of implied contracts, which we will take up in detail in the next part, Blackstone was perfectly frank about how one does this. Implied contracts were "such as reason and justice dictate, and which therefore the law presumes that every man undertakes to perform." [II-443: *see*

III-158] Outside the law of contracts proper, Blackstone used the same device in handling problems such as revocation of wills [II-376] and statutes [I-90]; warranties in sales of real estate [II-300-01]; easements [II-35-36]; unfair competition [III-235]; copyright [II-406]; manumission of villeins [II-94]; determining the intention of the patron of a church [I-385]; fixing the duties of those engaged in the common callings [III-163-64]; and deciding on the presence or absence of the mental element necessary to make an act of a particular kind a crime. [IV-200] The flexibility of implication, and its ambiguity as between what people actually want and what they ought to want, are apparent in the following passage about masters and servants:

As for those things which a servant may do on behalf of his master, they seem all to proceed upon this principle, that the master is answerable for the act of his servant, if done by his command, either expressly given, or implied . . . . If an innkeeper's servants rob his guests, the master is bound to restitution: for as there is a confidence reposed in him, that he will take care to provide honest servants, his negligence is a kind of implied consent to the robbery . . . . So likewise if the drawer at a tavern sells a man bad wine, whereby his health is injured, he may bring an action against the master: for although the master did not expressly order the servant to sell it to that person in particular, yet his permitting him to draw and sell it at all is impliedly a general command. [I-429-30]

Although he excluded them from the *doctrinal category* of contract (which was part of the law of things), Blackstone treated the private relations of master and servant and husband and wife as consensual. It was therefore easy enough, as in the example just given, to use implication as an alternative to convenience in fleshing out the internal details of the hierarchy. [E.g., I-425] But he used the same idea to justify parents' obligation to support their children, which we have seen was the "natural" basis for many of the merely "convenient" regulations of the institution of marriage. "By begetting them, therefore, they have entered into a voluntary obligation to endeavour, as far as in them lies, that the life which they have bestowed shall be supported and preserved." [I-447] Corporations were, in principle, formed "by the mere act and voluntary association of their members," and the king's "consent" was "absolutely necessary." But both the consent and the terms of the voluntary agreement could be, and, for many of the most

important existing corporations, had to be "implied." [I-472-73]

Blackstone also used the implication device to legitimate the existence of the state, the peculiar composition of its powers, and the body of common and statute law that structured and regulated the intermediate institutions of civil society. The analysis began with the state in the abstract:

And this is what we mean by the original contract of society; which, though perhaps in no instance it has ever been formally expressed at the first institution of a state, yet in nature and reason must always be understood and implied . . . namely, that the whole should protect all its parts, and that every part should pay obedience to the will of the whole, or, in other words, that the community should guard the rights of each individual member, and that (in return for this protection) each individual should submit to the laws of the community. [I-47-48]

The composition of Parliament was that "which (upon the supposition of an original contract, either actual or implied) is presumed to have been originally set up by the general consent and fundamental act of the society." [I-52. *See also* I-162] The executive power was vested in the king "by the general consent of the people, the evidence of which . . . is long and immemorial usage." [I-190] The terms of the arrangement had once been merely implied, but after the Revolution of 1688, Parliament had "reduced that contract to a plain certainty." [I-233] The Revolution itself Blackstone justified wholly in contractual terms [I-211, 244]; likewise the particular definition of the king's prerogative. [I-238] Implied obligations bound the king before the formal contractual ceremony of inauguration, and the subject "antecedently to any express promise." [I-368-69; *see* I-237]

These social contractarian arguments are familiar in the context of the state and the king. But it is striking that Blackstone also used them to account for particular governmental activities that we see as adequately justified by the democratic character of the legislative power that commands them. In other words, he used implied social contract as an alternative to popular sovereignty. For example, the power to inflict punishment for crimes not *mala in se* was grounded in "the consent of individuals; who, in forming societies, did either tacitly or expressly invest the sovereign power with the right of making laws, and of enforcing obedience to them when made." [IV-8; *see* IV-127] Even the exclusivity of the state's power to punish crimes against the law of nature (which power

was previously "vested in every individual") needed the justification of "the consent of the whole community." [IV-7-8] The particular punishment of forfeiture of property was merely the consequence of implied revocation by the offender of the implied social contract [I-299; IV-382], while "the humanity of the English nation [had] authorized by a tacit consent" the general relaxation of criminal penalties. [IV-376]

Among the obligations that were "necessarily implied by the fundamental constitution of government, to which every man is a contracting party," was that to "pay such particular sums of money as are charged on him by the sentence, or assessed by the interpretation of the law." These civil, as opposed to criminal, liabilities included damage judgments in law suits, and local fines, forfeitures and taxes. [III-158-61] We have seen already that the subject had an absolute personal right to pay the king no taxes "but such as are imposed by his own consent, or that of his representatives in parliament." [I-140] Taxes were "a portion which each subject contributes of his property, in order to secure the remainder." [I-281]

Blackstone did *not* argue that the established church, the nobility and the military were legitimate institutions because the populace had impliedly consented to their existence. Instead, he took the indirect route of imputing a consent to the existence of the legislative and prerogative powers that sustained them, along with a consent to abide by all the rules and regulations that governed them. When he entered into society, a man found himself "bound to other duties towards his neighbour than those of mere nature and religion: duties, which he has engaged in by enjoying the benefits of the common union; and which amount to no more than that he do contribute, on his part, to the subsistence and peace of the society." [I-45] The only limit on this blanket consent derived from Blackstone's other legitimating argument—that from convenience:

But every man, when he enters into society, gives up a part of his natural liberty, as the price of so valuable a purchase; and, in consideration of receiving the advantages of mutual commerce, obliges himself to conform to those laws, which the community has thought proper to establish. . . . For no man, that considers a moment, would wish to retain the absolute and uncontrolled power of doing whatever he pleases: the consequence of which is, that every other man would also have the same power; and then

there would be no security to individuals in any of the enjoyments of life. Political therefore, or civil liberty, which is that of a member of society, is no other than natural liberty so far restrained by human laws (and no farther) as is necessary and expedient for the general advantage of the public. [I-125]

I have argued in this section that Blackstone divorced the institutions of hierarchy from any basis in nature, divine will or immanent social order, yet nonetheless managed to resurrect them as appendages to a system of absolute rights of persons. The analogy with his treatment of the law of wrongs seems clear. In that case, he used the idea of evolution to meet the needs of commerce, along with that of strictness in the interests of political liberty, to show that the common law remedial system served, rather than undermined, the system of rights. *Within* the law of rights, he used convenience and implied intent to similar purpose: they permitted him to show that the existing order was fully consistent with liberal ideals that merely appeared to contradict it.

I have presented this defense piecemeal, but it is important to see that it was a coherent response to the liberal critique. Blackstone justified *both* the role of the state in creating and sustaining the institutions of hierarchy, *and* the role of the institutions so created and sustained within the state itself. It was convenient that there be a nobility and an established church, and all subjects impliedly consented to the laws that structured them. It was also convenient, and all subjects had impliedly agreed, that they should together form in the upper house of the legislature a check on the power of the king and the Commons.

From an American point of view, the verdict of history seems to have been as decisively against Blackstone's hierarchies as it has been against the system of writs, pleadings and jurisdictions. And yet his discussion was an important contribution to the emergence of liberal legal/political theory, as well as an obstacle to be overcome in the course of its development. We will take up both of these aspects of his work in Part V. Before we do so, it seems best to examine the law of things.

## PART FOUR

### THE RIGHTS OF THINGS

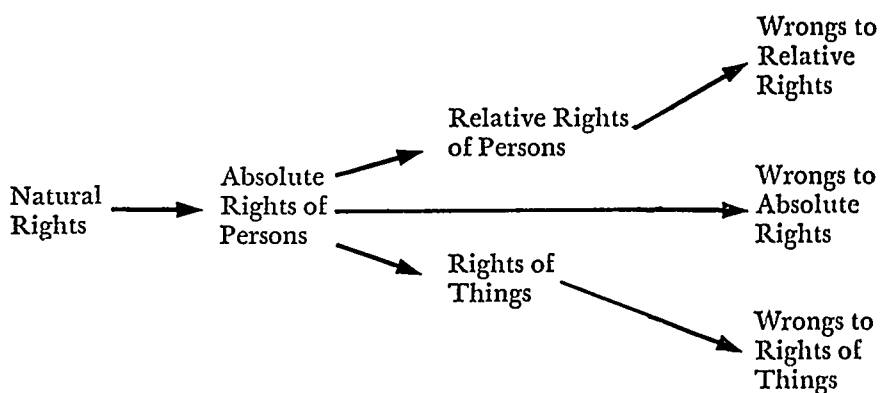
In Part III, I argued that Blackstone split Book I of the *Commentaries* between absolute and relative rights in order to legiti-



mate the second category in terms of the first. My goal was to *reduce* relative to absolute rights much in the way Part II reduced "wrongs" to rights in general. The analysis of Book II, the Rights of Things, is in some ways easier and in some harder than those we have already undertaken.

It is easier because Blackstone provided a chapter introductory to Book II that explained in a general way that the rules defining and regulating the transfer of property were a matter of convenience in securing a limited natural right of "enjoyment" of property based on occupancy. And he justified criminal punishment for violating these rules in terms of implied consent. Whereas both the law of wrongs and that of relative rights were legitimated step by step, with rare references to their relationships as *wholes* to absolute rights, Blackstone self-consciously addressed himself to the task of explaining private property as a coherent institution.

It is thus quite easy to analogize the treatment of "things" to that of "persons in relations." In each case, natural rights, positivized as "absolute rights of persons," created a need for convenient regulations. Absolute right holders consented to these by implication. Given this analogy, we can interpret the structure of the *Commentaries* as follows:



The first section of this Part presents the material about the law of things that permits us to complete the picture of the *Commentaries* in this way. The second section takes up a more puzzling aspect of Book II. Blackstone defined the subject matter of this Book as follows:

The former book of these Commentaries having treated at large of the *jura personarum*, or such rights and duties as are an-

nexed to the *persons* of men, the objects of our inquiry in the second book will be the *jura rerum*, or those rights which a man may acquire in and to such external things as are unconnected with his person. These are what the writers in natural law style the rights of dominion, or property . . . [II-1]

The problem here is that the assertion that the rules of Book II were concerned with the relations between persons and things was simply false. Blackstone was able to make it plausible only by using fictions, by exploiting ambiguities in the definition of words like "property" and "right," and by displacing particular rules that fell within the doctrinal categories of Book II back to Book I, where their inconsistency with his general plan could go unnoticed. After describing these procedures, I will try in the third section of this Part to explain them.

#### A. *Legitimizing the Institution of Private Property by Appeal to Convenience*

Blackstone's account of private property was not at all original. Its interest lies in its analogy to his treatment of relative rights of persons, and in the clues it offers to the organizational plan of his work. His goal in dealing with the relative rights of persons had been to legitimate institutions of formal inequality by referring back to the formally equal absolute rights of persons. By contrast, the law of things was itself a domain of formal equality. What needed justification was the *factual inequality* that private property made inevitable.

Blackstone solved this problem by making a sharp distinction between the right to "use" a physical object and full scale ownership, "or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe." [II-2] In the most primitive period, when there were few people and abundant resources (given the technology of the time), there was and could be no ownership of things, in the sense of dominion. "[A]ll was in common," [II-3] except that "by the law of nature and reason, he, who first began to use [a thing], acquired therein a kind of transient property, that lasted so long as he was using it, and no longer: or, . . . the *right* of possession continued for the same time only that the *act* of possession lasted." [*Id.*] The history of property law was that of the gradual extension of this initial

natural right to the point at which an owner could have full dominion.

The basis for this extension was the increase both in population and in technical skill:

But when mankind increased in number, craft, and ambition, it became necessary to entertain conceptions of more permanent dominion; and to appropriate to individuals not the immediate *use* only, but the very *substance* of the thing to be used. Otherwise innumerable tumults must have arisen, and the good order of the world be continually broken and disturbed, while a variety of persons were striving who should get the first occupation of the same thing, or disputing which of them had actually gained it. As human life grew more and more refined, abundance of conveniences were devised to render it more easy, commodious, and agreeable; as, habitations for shelter and safety, and raiment for warmth and decency. But no man would be at the trouble to provide either, so long as he had only an usufructuary property in them, which was to cease the instant that he quitted possession. [II-4]

Having once established these "civil peace" and "production incentive" arguments to explain property in houses and clothing, Blackstone extended them to cover food and other kinds of moveable property "improved and meliorated by the bodily labour of the occupant, which bodily labour, bestowed upon any subject which before lay in common to all men, is universally allowed to give the fairest and most reasonable title to an exclusive property therein." [II-5] In other words, he endorsed the Lockean labor theory of property along with the others. With the introduction of agriculture, the same arguments justified property in land and water.

By the end of the discussion, he was defending rules vesting the sovereign with property in wrecks and estrays, and in forests, waste ground, and game, on the ground that "quarrels would frequently arise among individuals, contending about the acquisition of this species of property by first occupancy," had not the law "wisely cut up the root of dissension. . . . And thus the legislature of England has universally promoted the grand ends of civil society, the peace and security of individuals, by steadily pursuing that wise and orderly maxim, of assigning to every thing capable of ownership a legal and determinate owner." [II-14-15]

Thus far, the natural right of use had been extended by arguments of convenience to give the first occupant a right of indefinite

control unrelated to use. The next step was to develop a theory of transfer. Here Blackstone, who had already endorsed a civil peace theory, an incentives theory, and a labor theory, endorsed the will theory as well: "[p]roperty, both in lands and moveables, being thus originally acquired by the first taker, which taking amounts to a declaration that he intends to appropriate the thing to his own use, it remains in him, by the principles of universal law, till such time as he does some other act which shews an intention to abandon it." [II-9] The justification of rights to transfer property was that, without them,

upon one man's dereliction of the thing he had seised, it would again become common, and all those mischiefs and contentions would ensue, which property was introduced to prevent. For this purpose therefore of continuing the possession, the municipal law has established *descents* and *alienations*: the former to continue the possession in the heirs of the proprietor, after his *involuntary* dereliction of it by his death; the latter to continue it in those persons to whom the proprietor, by his own *voluntary* act, should choose to relinquish it in his lifetime. [II-294]

All the multitude of particular rules governing the forms of transfer, by deed, by fictitious suit in court, by contract, by will, and by intestacy, were "necessary [so] that this transfer should be properly evidenced: in order to prevent disputes, either about the fact, as whether there was any transfer at all; or concerning the persons, by whom and to whom it was transferred." [*Id.*] Blackstone laid particular emphasis on the wrongness of the popular notion that the rights of spouse and children to intestate succession had "nature on [their] side." He viewed both the right of testation and the particular rules of intestacy as inconsistent with natural law, which would terminate ownership at the end of occupancy. "[C]ivilized governments" modified natural law because it "would be productive of endless disturbances." [II-10]

The particular rules of intestacy were "a wise and effectual, but clearly a political, establishment; since the permanent right of property, vested in the ancestor himself, was no *natural*, but merely a *civil* right." [II-10-11] The diversity of legal regimes on the subject, even within England itself, was so great "as if it had been meant to point out the power of the laws in regulating the succession to property, and how futile every claim must be that has not its foundation in the positive rules of the state." [II-13. *See also* II-489-91]

Blackstone thought the theories of Grotius and Puffendorf, that property was validated by the "tacit and implied assent of all mankind," "savour[ed] too much of nice and scholastic refinement." [II-8] But, as we have seen already, he used implication to legitimate many particular rules of property (for example, easements, warranties of title, and copyright).<sup>41.1</sup> He also used it in a more general way to justify punishment of all those "offences merely against the laws of society, which are only *mala prohibita*, and not *mala in se*." [IV-8. See also IV-127] Within this dichotomy, he placed theft on the side of *malum prohibitum*, since it was an infringement of that "right of property, which . . . owes its origin not to the law of nature, but merely to civil society." [IV-9] He then expressed a "doubt" about the legitimacy of capital punishment for theft, on the ground that "no individual has, naturally, a power of inflicting death upon himself or others for actions in themselves indifferent." [*Id.*]

From all of this, it is apparent that there is a close analogy between Blackstone's treatment of the rights of things and his treatment of the relative rights of persons. Blackstone never explicitly described the similar operations of deriving the two sets of rules, by convenience and implied consent, from absolute rights. But he did sometimes refer to the two sets together in a way that quite clearly conveyed the analogy. For example, "[n]ecessity begat property: and in order to insure that property, recourse was had to civil society, which brought along with it a long train of inseparable concomitants; states, government, laws, punishments, and the public exercise of religious duties." [II-8] He opposed to the realm of absolute rights the general concept of civil society, defined both by the formally unequal rules of hierarchical institutions and by the formally equal rules of property.

Once one recognizes these similarities between relative rights of persons and rights of things, it becomes, paradoxically, difficult to distinguish them. In order to understand the structure of the *Commentaries* as a whole, we need to understand what Blackstone meant when he opposed "rights and duties . . . annexed to the *persons* of men" to "rights which a man may acquire in and to such external things as are unconnected with his person." [II-1]

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41.1 See pp. 309-10 *supra*.

## B. *The Organization of the Rights of Things*

The general subcategories of the law of things are familiar to the modern reader.

The objects of dominion or property are *things*, as contradistinguished from *persons*: and things are by the law of England distributed into two kinds; things *real* and things *personal*. Things *real* are such as are permanent, fixed, and immovable, which cannot be carried out of their place; as lands and tenements: things *personal* are goods, money, and all other moveables; which may attend the owner's person wherever he thinks proper to go. [II-16]

Book II was thus overwhelmingly concerned with what we call private law. There were some public institutions included (for example, "offices" [II-36], and the implied contractual duties of petty officials to perform their functions non-negligently [III-163-64]) but there was nothing like the confusing mixture of Book I. What Book II did *not* include was the private law rules that had been dealt with already, namely: the tort rules protecting bodily security and free locomotion (covered under wrongs to the absolute rights of persons); the civil privileges and disabilities associated with various statuses; and the rules governing employment, marriage, parent-child relationship and guardianship (all dealt with under relative rights of persons).

In this section, I will make two points about Blackstone's approach. First, neither the person/thing distinction nor the internal division of the Rights of Things corresponds to any of the ways of subdividing private rights that are familiar to us. Second, both the person/thing distinction and the internal organization of Book II make sense if we see them as designed to show that formally equal rules that generate factual inequality relate persons to objects, rather than carrying out a state policy of helping one group of persons to dominate another.

### 1. *The Oddness of Blackstone's Categorical Scheme*

At first blush, it may seem obvious that Blackstone's category of Rights of Things, which he said had to do with "property," was that of rules about things, while the Rights of Persons was about persons. Nothing could be further from the truth. Book I

contained detailed discussions of church property and of the property rights of married women and children. Book II contained, in the section on incorporeal hereditaments, discussions of numerous obligations merely to pay money out of one's assets, obligations which did not involve specific things. It also contained the general discussion of contract law, covering both contracts that involve things, *and* those involving the rendering of services, mere abstentions from action, and various duties of the citizen to the state and of public officials to the citizenry.

Austin, who saw this problem, thought that Blackstone's organizing principle was the distinction between two kinds of rights of persons, rather than that between persons and things. According to Austin, Book I was meant to be about the rights of people in statuses that distinguished them from the norm, and Book II about rights one gained simply by virtue of being a subject. This meant treating Blackstone's references to "external things of this world" as confused or irrelevant, since the division had nothing to do with "things" at all. But all persons had absolute rights to bodily security and freedom of locomotion. Since these were nonetheless included in Book I, which supposedly had to do with status, Austin concluded that Blackstone was analytically incompetent.<sup>42</sup> As we will see when we compare Blackstone's classificatory scheme with our own, Austin missed the point.

(a) *Property as Things versus Property as Rights*

From a modern point of view, Blackstone's great vice was that he constantly disregarded an elementary ambiguity in both the lay and the legal use of the word "property." Sometimes we use property to mean a thing that is or can be owned, as in, "Get off my property!" Sometimes we use it to mean a legally enforceable right with respect to a particular physical object, as in, "The life tenant has only a qualified property in the land." Sometimes, we use it to mean any expectation that the state will intervene at one person's behest to make another do or not do something, as in "A man's reputation is property, and not to be interfered with." In the first usage, "property" means *thing*. In the second, it means *right*, but refers only to rights of a particular kind, such as easements, estates on condition, and so forth. In the third, it means

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42. J. AUSTIN, 1 JURISPRUDENCE 69-74 (4th ed. 1873).

any right at all. The three usages thus differ in degree of abstraction.

They differ in a second way as well. When one refers to a particular object as "my property," one is understood to indicate full ownership—a fee simple title to land, for example. We generally use the phrase "property *in* X," to indicate an interest falling short of "absolute dominion." The thing in question, if it is a thing, must be shared somehow with others. The fully abstract reference to *any* right as property suggests nothing at all about the type or quantity of interest. Legal rights are, after all, of every conceivable variety. There is full ownership of a determinate thing. But there is also the "property" of a trust beneficiary who has only an expectation that a settlor will die before he has either used up the *res* or revoked the trust itself. There is property in trade secrets, which can be vindicated only against intentional invasion by an employee. There is property, but only against the promisor, in the performance of a personal service contract, even if it is conditioned on some unlikely occurrence. There may be property in the form of a limited right against third parties to noninterference with a relationship even when the relationship is not legally binding on the parties to it.

If property means "absolute dominion over the external things of this world," then it is only a small part of private law. If it means absolute dominion *or* some lesser legally protected interest in external things of this world, then the category is larger, but by no means all-inclusive, since the whole field of what are called "obligations" is excluded. If property means simply "right," then it includes all of private law. There is nothing that compels us to adopt one particular usage or categorical scheme rather than another. But it is essential to use the usage adopted consistently. Blackstone began by asserting that absolute dominion over external things was the subject matter of Book II, but included therein many, but not *all* the rules about non-absolute power over things, and many but not *all* the rules about obligations.

We need to understand this pattern of inclusion and exclusion of rules that do not fit within the paradigm of the fee simple interest in land. As a first step, the rest of this subsection applies to the *Commentaries* the dominant modern modes of organizing the universe of private law rights. This procedure has two purposes. It will allow us to define precisely the respects in



which Blackstone's categorical scheme was peculiar and needs explaining. And it will allow us to show how far the process of assimilating private law rules to the liberal schema of state power versus individual freedom had proceeded at the time he wrote.

The first major modern division of private law rights is that between contract rights and rights protected through tort law. Contract law supposedly enforces voluntarily assumed obligations of determinate persons, while tort law supposedly enforces obligations of "all the world" imposed by the state. The second division overlaps the first: it is that between rights whose violation gives rise to a "secondary" right to restitution of a specific object or "fund," and rights whose violation gives rise merely to a secondary right to the payment of compensatory damages from the violator's assets, if the violator is solvent. On the "damages" side of this second division are "obligations," including *most* contract and tort rights, and quasi-contractual rights. On the other are the rights of a beneficiary against a trustee of a specific thing, rights arising from constructive trusts, and all other rights to recover "property," whether the cause of action sounds in tort or contract.

Each of these divisions is sometimes spoken of as involving a distinction between persons and things. Contract rights are said to be "in personam" while tort rights are "in rem." Here the distinction is between rights against determinate individuals and rights against the world. Within the second division, rights to a share of assets—obligations—are vindicated by "personal" actions, whereas "property rights" are vindicated by actions whose effects are "in rem." These various usages, much complicated by the maxim that "equity acts in personam" though only to protect rights "in rem," confused generations of law students until classificatory schemes fell out of favor. For our purposes, the important point is only that neither division makes sense out of Blackstone's arrangement.

#### (b) *Contract versus Tort in the Commentaries*

Within the liberal mode of mediation of the fundamental contradiction, the private law distinction between tort and contract is as important as the distinction between public and private law. By the larger public/private division, liberalism expresses its split vision of a realm of interaction of individual right holders and a distinct state realm devoted to enforcing rights. The tort/

contract division expresses the notion of good fusion in the private domain predicated on respect for rights. Tort law defines rights; its enforcement by the state regardless of the will of the parties protects them against infringement. Contract law defines the mechanisms of fusion: it tells us how we can combine with others in cooperative ventures that have been freed of domination by the prior imposition of tort duties. The enforcement of contracts—their conversion into rights of the parties—prevents the subversion of this good fusion by misbehavior after the fact (that is, breach).

In Part III, we discussed the liberal private law slogan of equality of rights. Tort and contract represent the choice of formal legal equality over substantive equality. But, as with all the other liberal formulations, they reproduce the fundamental contradiction within the conceptual devices designed to resolve it. Thus the slogan of formal legal equality does not tell us how to define formally equal rights, either in tort or in contract law. The choices the state makes in the process of definition have a direct influence on the actual outcomes of interaction of private individuals. And there exist within liberalism alternative theories of both delictual and contractual obligation.

The history of private law is that of the gradual elaboration of the tort/contract schema to cover more and more instances of private interaction, along with the clearer and clearer articulation, *within* each, of contradictory principles of freedom of action and of collective compulsion in the interest of "security." This course of expansion was motivated throughout by the belief that the logical coherence of private law could be sustained by simplifying and clarifying it. But it led, when the process was complete, to the loss of faith in the meaningfulness of the internal principles that supposedly organized the two fields, and, indeed, to their virtual merger in the process sometimes referred to as the "death of contract."

We are concerned not with the details of this evolution, but with its early stages, so far as we can trace them in the *Commentaries*.

### (i) *Contracts*

There are three points about Blackstone's treatment of contract law. First, he understood the general contract notion much as we do. Second, he nonetheless did not employ it, in our fash-

ion, as an abstract category to organize masses of private law rules. His usage was both narrower and broader than ours. Third, his conception of contract was dominated by the express/implied distinction, rather than by the notion of voluntariness. It was continuous with, rather than sharply opposed to, the mass of obligations imposed without regard to the consent of individuals.

Blackstone defined contract in a fully abstract manner as "an agreement upon sufficient consideration, to do or not to do a particular thing." [II-442] In his introductory discussion of the law of wrongs, he distinguished clearly between contract and tort, on the basis of whether the rights in question were against determinate persons or against the world:

*Personal actions are such whereby a man claims a debt, or personal duty, or damages in lieu thereof: and, likewise, whereby a man claims a satisfaction in damages for some injury done to his person or property. The former are said to be founded on contracts, the latter upon torts or wrongs: and they are the same which the civil law calls "actiones in personam, quae adversus eum intenduntur, qui ex contractu vel delicto obligatus est aliquid dare vel concedere."* Of the former nature are all actions upon debt or promises; of the latter all actions for trespasses, nuisances, assaults, defamatory words, and the like. [III-117]

Blackstone's discussion of consideration was quite modern; indeed it was clearer though much less developed than Langdell's (it included Mansfield's recent innovations). [II-445] He had a general notion of contract damages as designed to make the promisee whole. [II-397, 443; III-116] And he listed the Roman law contract types, some of which, such as the type "*facio, ut facias*; as, when I agree with a man to do his work for him, if he will do mine for me," [II-444] were fully abstract, involving no reference to physical objects.

These modern aspects of his treatment are all the more striking because he failed to use them to generate a general organizing principle for private law rules. Contract appeared in three distinct modes. First, it was a formal doctrinal category within the law of things. Blackstone divided "things *personal*," defined as "things *moveable*, which may attend a man's person wherever he goes," [II-383] into two groups: there were things personal "in *possession*: which is where a man hath not only the right to enjoy, but hath the actual enjoyment of, the thing," and "choses in action," or things personal "in *action*; where a man hath only a

bare right, without any occupation or enjoyment." [II-389] He undertook to show that "all property in action depends entirely upon contracts, either express or implied; which are the only regular means of acquiring a *chose* in action." [II-397] He then went beyond this identification to argue the converse: that contracts "usually" create choses in action. [II-442]

But contract was more than a doctrinal category within the law of things. In Book I, Blackstone defined the personal relations of master and servant and husband and wife as "contracts," and analyzed them in contract terms, without any reference to the later discussion of choses in action. And, throughout the *Commentaries*, he used the notion of implied contract to legitimate an enormous diversity of public and private law rules. He made no attempt to integrate these diverse references into the discussion of choses in action, although in that formal discussion he did mention public law implied contractual obligations to pay judgments, fines, and forfeitures.

What this means is that Blackstone's notion of contract as a distinct doctrinal category was less general than ours. We understand *all* legally binding voluntary transactions, except gifts, through the prism of the contract concept, including, for example, agreements to perform services (whether of employment or not), to marry, to transport for hire, to engage in partnerships or agencies, to supply gas or water, to sell goods or real estate. The process of abstraction continues into the present in areas like the law of landlord and tenant. But Blackstone, in his formal doctrinal discussion of the contract cause of action, restricted himself to the four typical cases of sales, bailment, chattel leases and debt. He insisted that each of these was a way for a person to gain dominion over a "thing" that happened to be "not in possession." [II-397-98] This in spite of the fact that his *definition* was broad enough to include everything we include, and that his *usage of the word* covered the marriage and employment relations, as well as the whole range of obligations based on implied consent.

But Blackstone's notion of contract was also *more* general than ours. His indiscriminate use of implication meant that virtually all legally binding obligations running from one determinate person to another were "contractual." Individuals impliedly consented to everything from the composition and powers of Parliament to the mill owner's right to a specific group of local customers as against a competitor. In this informal sense, contract was as diffuse

and omnipresent as it was defined and constricted in the formal doctrinal sense. One of the bases for Blackstone's claim that law and equity were essentially similar systems was that the law courts possessed "that implied contract, so highly beneficial and useful . . . which is the ground of an action on the case almost as universally remedial as a bill in equity." [III-432; see IV-442]

We reject Blackstone's diffuse approach because we insist that contract differs from tort *not only* in that it gives rights against particular persons (as opposed to rights against the world), but also in that it is founded on consent. Public law obligations are imposed by the will of the sovereign people, and are therefore contractual only by way of political metaphor. Private law duties that Blackstone "implied" we see as "quasi-contractual," meaning that they are not contractual at all, but flow from the will of the state. Or we interpret them as "compulsory terms," or as state-imposed duties of "private enterprises affected with a public interest." Implied contract blurred together what we today call contracts-implied-in-fact, which are "real" because based on a genuine factual inference of consent, and "contracts-implied-in-law," which are part of the body of rules by which the state imposes respect for individual rights independently of consent.

The same blurring of the issue of voluntariness occurred within Blackstone's formal category of contract as a mode of acquiring title to a chose in action. For us, the primacy of consent means that the objective, reasonable-person theory of contract formation, the law of duress, mistake, impossibility, and fraud all turn initially on a determination of the will of the parties, and subsequently on the choice between imposing community standards of morality and merely ratifying the exercise of private bargaining power. Likewise for the issues of warranties in the sale of goods or provision of services. Blackstone resolved each of these issues by a blanket appeal to an implied contractual obligation that did "not arise from the express determination of any court, or the positive direction of any statute, but from natural reason, and the just construction of law." [III-161] The court could decree restitution in "almost every case where the defendant has received money which *ex aequo et bono* he ought to refund" because the law "implies that the person so receiving promised and undertook to account for it to the true proprietor." [III-162]

What emerged from Blackstone's treatment was a *dual* theory of contract, both halves of which minimized the tort/contract dis-

inction. First, the doctrinal category was truncated, rather than abstracted to cover the whole range of voluntary dealings. It was confined within the rights of things, and further within the law of choses in action, as opposed to that of things in possession. By the trick of considering as typical only the sale of goods, bailment, chattel leases, and debt, Blackstone made it appear that contract concerned only title, and this in turn made breach of contract analogous to any other tortious interference with a property right. Second, the dominant notion of implication *also* served to incorporate contracts into, rather than setting it up in opposition to the law of torts. By blurring the issue of voluntariness, Blackstone could find contract everywhere. But in this diffuse usage it appeared as an auxiliary to the general law of social relations, called in to justify state control of individuals where public law or tort law was defective in creating obligations, rather than as an alternative general principle of voluntary obligation.

## (ii) *Torts*

As we have seen already, Blackstone was quite capable of making a general distinction between tort rights against the world and contract rights against determinate persons. But there was no separate doctrinal category of tort duties, because the tort concept infused everything. The initial division between rights and wrongs expressed the idea that *all* of the law was concerned with the protection of rights guaranteed by the state against infringement. [III-23, 208; I-45] The "absolute" rights of personal liberty, bodily security, and private property discussed in the first part of Book I, are the foundations of modern tort law. The mixture of property and jurisdiction in the public and private relations, discussed in the second part of Book I, gave rise to a multiplicity of rights against the world belonging to husbands, servants, clerks, and military officers. [*E.g.*, III-142-43] The law of wrongs to the rights of things was mainly concerned with tortious injury to land and chattels.

But it would be a mistake to think that because torts were everywhere, there were no general tort principles. People as people were entitled to bodily security, for example, and there was a correlative absolute duty of all to all to respect the entitlement. In the chapter on wrongs to absolute rights, Blackstone offered an organized presentation of tort law that is perfectly familiar to

the modern student; we encounter threats, assaults, battery, wounding, negligence, nuisance, and defamation. Personal liberty had its remedial protection in the law of false imprisonment.

There are two things lacking to our modern view of the subject. The first is the sense that tort is a distinct domain from contract. As we have seen already, the two fields were merged rather than opposed. Second, *within* discussions of tort duties, Blackstone made only the most occasional and casual use of the distinctions between intentional and unintentional harm and between strict liability and negligence that now seem crucial to understanding the subject. The modern insistence on these categories expresses the state-individual, power-freedom duality *within* tort law, just as the tort/contract distinction expresses it within private law as a whole. Liability flowing from the intentional invasion of another's "legally protected interest" (that is, "right") can be seen as in some sense "voluntary." The actor knew of the victim's right and *chose* to violate it. Yet it is no more possible to *deduce* the bounds of tort liability from the premise of respect for rights than it is to deduce the rules of public law from the premise of popular sovereignty or the separation of powers.

For our purposes, it is enough to note a familiar pattern: Blackstone was conscious of both the intentional/unintentional and the negligence/strict liability distinctions, but they played no role in his organizational scheme. He seemed altogether innocent of awareness of the problem of defining the criteria of liability consistently over the universe of possible legally protected interests. His tort law was no more founded on a developed theory justifying compulsion than his contract law was founded on the principle of voluntary consent.

There is a good deal of similarity between Blackstone's treatment of the contract/tort distinction and his treatment of that between public and private law. Contract resembled public law in that it was a distinct doctrinal category, but a much less important one than it was to become in the 19th century. Second, the section on contract was continuous with, rather than opposed to, the rest of property law, just as public law was continuous with other relative rights of persons. Third, in spite of narrow formal confinement, implied contract, like public law, was scattered throughout the *Commentaries*. Finally, tort diffusely enveloped, rather than starkly opposed, contract, just as private law diffusely enveloped public.

(c) *Property versus Obligation*

If I have been the victim of a breach of contract or a tortious injury to my bodily security, I acquire a right to recover damages from the aggressor. If he is insolvent, I share in his assets with his other creditors. By contrast, the beneficiary of a trust has a right to the trust *res* (which may be land, a chattel or a fund of money) which is not defeated by the insolvency of the trustee. The beneficiary is an "owner in equity" rather than a mere "creditor." The disadvantage of this status is that if the *res* perishes without breach of duty by the trustee, the beneficiary is out of luck, even if the trustee has ample assets from which he might reconstitute the *res*.

This distinction between a property right and a mere contractual or delictual right, called an "obligation," runs all through the law. Blackstone used it constantly. For example, when he discussed injuries to personal property in possession, he was careful to distinguish between the actions of detinue, trover and conversion according to the availability of restitution as opposed to damages. [II-145-53. *See also* II-117; III-412-13] But neither the distinction between rights of persons and rights of things, nor the internal organization of the latter category followed the line of division between "what is owned" and "what is owed."

We cannot say that the rights of persons were obligations and the rights of things property rights, for the simple reason that most of the law of contract fell into Book II on things. And property in the abstract was an absolute right of *persons*. As to the internal organization of the rights of things, it may at first appear that personal property "not in possession," Blackstone's chose in action created by contract, was an obligation, while the rest of the material concerned property rights *per se*. But this was not the case.

First, Blackstone organized the law of property, excluding contracts, according to *kinds of things*. For each kind of thing, he distinguished property rights from rights merely to damages for tortious interference, but included both in the discussion. Thus he first took up "dispossession" of personal property; then tortious injury to personal property; then dispossession of real property, then tortious injury to real property. The distinction between property and obligation was present, but subordinated to the distinction between the kinds of things. Second, Blackstone treated contract



rights to a chose in action in sharp isolation from the rest of the rights of things, but he did not distinguish the subject on the ground that it created obligations rather than property rights. Indeed, he defined contract as a mode of acquiring *title* to a *thing not in possession*. [II-397-98] As we will see, he went to great lengths, in the internal discussion of contract, to maintain the plausibility of this way of understanding the subject. Insomuch as he argued that contracts created rights strictly analogous to those created by conveyances of realty or personalty, he was doing his best to *deny* the distinction between property and obligation.

We need now to get an idea of what Blackstone did, rather than did not do. The notion of a person-thing relation was obviously central to the plan of the *Commentaries*, but it remains mysterious so long as we try to interpret it through the lens of our modern modes of classification. In the next subsection, I argue that it is nonetheless intelligible, when seen as an aspect of a particular historical version of the evolution of English land law.

## 2. *From Feudal to Individual Ownership*

In his "philosophical" account of the institution of property, Blackstone traced a progression from communal ownership in the state of nature, with temporary rights of occupancy for use, to "absolute" individual ownership of the "substance" of things in civil society. But he also provided, in his introductory chapters on real property, a quite distinct and much less abstract picture, this one intended to portray the actual historical evolution of the existing English rules about land. The historical, like the philosophical account used "convenience" as its principal analytical tool, but here in the sophisticated form of two warring "policies." The Normans, according to Blackstone, had imposed the "feudal policy" at the time of the conquest. The subsequent history of the law of property was that of the progress of the "commercial policy," which had gradually undermined and then finally simply abolished its predecessor.

### (a) *The Commercial Policy*

Blackstone's ideas about feudalism do not correspond to those of later historians. As we saw in the discussion of the law of wrongs, he disapproved of the Normans, and liked to blame things on them.

He developed a coherent and detailed but essentially wrongheaded picture of their land law in order to have a point of departure, or contrasting pole, for his description of the practices of his own time. This picture was no more original than his philosophical account of property in general, but it had the same qualities of compactness, clarity, and eclectic inclusiveness. It served generations of American lawyers not only as an indispensable guide to the hermetic vocabulary of property law, but also as a capsule statement of *the truth* about their past. Feudalism was a sort of evil mirror image for emerging liberalism: it gave liberalism definition and direction by stating clearly what it was not and where it had come from.

According to Blackstone, the motive force of the feudal policy was military security. [II-45] This goal was achieved as follows: the king was the owner of all the land in the kingdom; he parcelled it out to his principal military lieutenants, who further subdivided it among their followers. Each recipient of land agreed to perform military or other services for his feudal lord. In order for these networks of obligation to function as the skeleton of military organization, there had to be restrictions on the right of those lower down in the hierarchy of tenure to alienate their land, or to dispose of it by will, without the permission of their superiors. [II-44-53]

At the different levels of the hierarchy, the services owed in exchange for the right to use land were different. Those who held of the king thereby became his soldiers for a limited number of days per year, or had to pay an annual sum of money; both groups had to submit to a variety of periodic exactions called "aids, relief, primer seisin, wardship, marriage, fines for alienation and escheat." [II-463] Those further down in the hierarchy had given up their personal freedom in exchange for their land: they were either copyholders, who had some security of tenure and defined duties, or genuine serfs who had neither. [II-57-77] In Blackstone's understanding, this hierarchy of tenures also defined the social system:

The ultimate property of all lands, and a considerable share of the present profits, were vested in the king, or by him granted out to his Norman favourites; who, by a gradual progression of slavery, were absolute vassals to the crown, and as absolute tyrants to the commons. . . . [T]he nation consist[ed] wholly of the clergy, who were also the lawyers; the barons, or great lords of the land; the knights, or soldiery, who were the subordinate landholders; and the burghers, or inferior tradesmen, who from their insignificance

happily retained, in their socage and burgage tenure, some points of their ancient freedom. All the rest were villeins or bondmen.  
[IV-419-20]

Given that the system of land tenure and the social hierarchy were the same system, it followed that the evolution of real property law was also social and political evolution. Blackstone regarded that process as one of "redemption" into "that state of liberty which we now enjoy" from a "complete and a well-concerted . . . scheme of servility." [IV-420] The legal/political steps in this process were the following: the gradual conversion of both the highest military and the lowest menial personal services attached to landholding into payments of fixed sums of money, so that all land was held on approximately the same terms; the abolition of restraints on alienation; and the abolition of the various particular monetary obligations to feudal superiors, including the king, that attached to the different kinds of tenure. [II-74-100, 287-90; IV-438] When these developments were complete, control of land was no longer something one derived from one's place in a legally enforced hierarchy of personal obligations; it was rather a consequence of the legal protection of one's "absolute right of private property."

These developments were one aspect of the triumph of Blackstone's "commercial policy." He said of the relaxation of restraints on alienation: "by degrees this feudal severity is worn off; and experience hath shewn, that property best answers the purposes of civil life, especially in commercial countries, when its transfer and circulation are totally free and unrestrained." [II-288] The remaining restrictions become instances of incapacity to exercise the full rights of citizenship, rather than aspects of the system of tenure, as in the cases of infants, married women, lunatics, aliens, and papists. [II-290-93] The final abolition of the maze of feudal obligations was "a greater acquisition to the civil property of this kingdom than even *magna carta* itself," [II-77] since they had degenerated into "nothing else but a wretched means of raising money to pay an army of occasional mercenaries." [II-76]

A second aspect of the commercial policy was the modernization of the remedial system, which we considered in Part II. A third was the emergence of the law of personal property, a category that included contract and commercial law in general. "Moveables" had been regarded in the feudal system as of little account,

since "the amount of [them] was comparatively very trifling."  
[II-384]

But of later years, since the introduction and extension of trade and commerce, which are entirely occupied in this species of property, and have greatly augmented its quantity and of course its value, we have learned to conceive different ideas of it. Our courts . . . have adopted a more enlarged and less technical mode of considering [personal than real property] . . . drawn . . . principally from reason and convenience, adapted to the circumstances of the times . . . . [II-385]

A fourth element was the development of judicial evasions of the rules designed to assure the power of landowners to entail their lands—that is, to make it impossible for eldest sons to sell or mortgage their patrimonies. The entail had been a crucial mechanism for preserving the stability and power of the landed aristocracy, as well as an obstacle to commercial and manufacturing development. The judges dealt with the issue by construing first the words of testaments and then the words of a statute directly contrary to the manifest intention of both private grantor and legislature. In effect, they redefined the estate tail so that the heir could alienate or encumber it, no matter how carefully the original owner had tried to prevent him from doing so. They then invented the rule against perpetuities to prevent the owner from setting up alternative devices to accomplish the same object.

Blackstone treated these acts of judicial aggression as motivated in part by general reasons of policy—"[t]he inconveniences which attended these limited and fettered inheritances," [II-112] the bad influence on children either guaranteed or forever excluded from inheritance, the defrauding of creditors who could not reach real assets, and so forth. [II-116] He acknowledged a purely political element as well: Edward IV, "observing . . . (in the disputes between the houses of York and Lancaster) how little effect attainders for treason had on families, whose estates were protected by the sanctuary of entails, gave his countenance" to the judges' decision simply to change the rule. [II-117] Blackstone's account of the rule against perpetuities was equally straightforward: "the law abhors" perpetuities because through them "estates are made incapable of answering those ends of social commerce, and providing for the sudden contingencies of private life, for which property was at first established." [II-174]

We are now in a position to make at least a preliminary com-

parison between the role of policy or convenience in the law of relative rights of persons and in that of things. There are two points of striking similarity. First, in each, the primary motives of policy were to prevent disorder and encourage industrious civic activity. In Book I, these were the justification for the balanced constitution, for hereditary monarchy, nobility and the established church. In Book II, the same arguments justified the rejection of ownership based on occupancy and limited to use, in favor of the regime of absolute dominion, free alienation and testation. Second, a basic evolutionary theme in each book was the limitation of arbitrary power: in Book I, constitutional history was that of the gradual restriction of the royal prerogative and the rise of the Commons; in Book II, the emergence of modern property law was made possible by the erosion of the various arbitrary incidents of tenure.

But there are dissimilarities just as striking. The basic argument of Book I was in favor of, while that of Book II was opposed to legally enforced hierarchy. The commercial policy was based on the idea that it was desirable that all men have equal rights to own; that the law should favor patterns of ownership that placed full control of property in single persons rather than dispensing control over a network of persons; and that property should pass easily from person to person. The policy of the relative rights of persons was that "[t]he most stable foundation of legal . . . government is a due subordination of rank, and a gradual scale of authority." [IV-105] In Book I, the king was the "fountain of honors," as well as of justice. But in Book II, Blackstone was delighted when "[t]he nobles, enervated by the refinements of luxury . . . and fired with disdain at being rivalled in magnificence by the opulent citizens, fell into enormous expenses; to gratify which they were permitted, by the policy of the times, to dissipate their overgrown estates, and alienate their ancient patrimonies." [IV-434]

### (b) *The Relation of Person to Thing*

The opposition of feudal and commercial policies within property law permits us to get an idea of what Blackstone meant when he contrasted rights "annexed to the persons of men" to rights "in and to external things." The history of property law meant to him the progressive extinction of social obligations arising out of land use.

At the beginning of the process, control of land was very

clearly a social matter: the law established a sort of committee each of whose members was linked to the others by rights and duties that determined what he or she could do with respect to the tract in question. This network was neither public nor private, in our sense. Its members performed for each other almost every imaginable social function, from defense, taxation, and the administration of justice to detailed decision-making about occupancy and production. At the end of the process, this network had disappeared. A "thing" (the land) was controlled, for the purposes of occupancy and production, by a single person, *the private owner*. Others were involved in defense, taxation and administration of justice with respect to the object, but their involvement was a consequence of their rights and duties as *state officials* to the private owner. His obligation in return was simply that of political allegiance.<sup>43</sup>

Of course, it was still true that the control of land was a social process, carried out through relations *among persons*. There were the political relations that determined the exercise of the public functions of taxation and direct regulation of land use by the owner. There was also the less salient relation of the state, the owner and anyone who might challenge that ownership. In this second relation, the state obliged the owners' rivals to let him make what decisions he pleased about occupancy and production.

Blackstone's descriptions of the earlier system, of the transition, and of the new system may have been profoundly inaccurate. We are not concerned with his qualities as a historian. What is clear is that the new system as he conceived it was different from, and much better than, the old. It is also clear that, in the new system, one of the multitude of members of the old controlling network had emerged with a distinctive *relation to the object*. The private owner's powers could much more easily bear the description of "absolute dominion" than those of any participant in the system of feudal tenure. His rivals were excluded; the roles of the state in excluding them, and in taxation and direct regulation, were minor in comparison to those of the old tenurial superiors. The owner's duty of allegiance was no longer an incident of land-holding, but shared with all subjects.

Blackstone saw all of this, as we do, as involving shifts in social organization and in the distribution of power and welfare. But he did *not* present it in terms of the substitution of one system of

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43. See P. ANDERSON, *LINEAGES OF THE ABSOLUTIST STATE*, ch. 1 (1974).

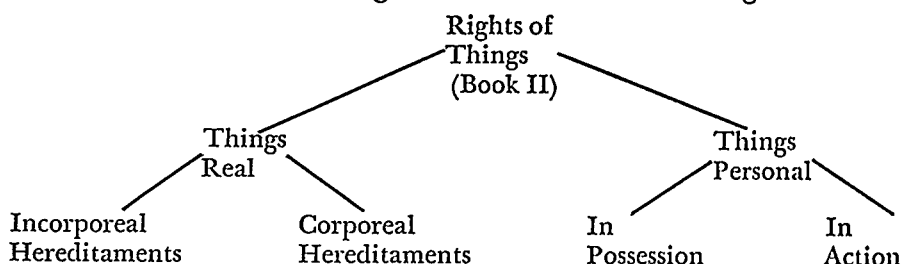
*social control* for another. His model was that of the "restoration of Saxon liberty," and his emphasis was on the dismantling rather than on the recasting of control. From this perspective the emergence of the private owner's particularly intense relation to the thing owned was vastly more important than it is for us. Just so long as one focused on the new person-thing relation, it was possible to ignore or minimize the complex of new person-person relations that had emerged at the same time. Such a focus made it look as though the meaning of change had indeed been *decontrol*: the private bearer of the property right had once been, but was no longer, socially impeded in his relations with his possessions.

From our point of view, it is obvious that Blackstone's point of view was distorting. The private owner's "freedom" to exclude others from his possessions has as its corollary his "power" to control the lives of those who cannot live without access to the means of production. Admission to the use of property is the carrot, exclusion the stick that orders our lives. It is a familiar notion that, through the definition and enforcement of legal rights in things, the state is deeply implicated in the particular order that emerges from the interaction of private individuals. And it is also familiar that a description of the legal system that obscures this implication of the state legitimates particular outcomes, suggesting that they are outside collective control, not the product of social choice, that they are in some sense "free," or natural, or merely inevitable.

The next subsection applies this interpretation of the intention behind the notion of a person-thing relation to the internal organization of Book II of the *Commentaries*.

### 3. *The Reification of Social Relations*

Blackstone's claim was that Book II was about property, and that property was absolute dominion over the external things of this world. He organized his exposition of property law along two dimensions. First, he distinguished four "kinds of things":



Second, for each type of thing, he distinguished the problem of defining the "estates" a man might have in it from the problem of defining the requirements of a valid transfer of "title" to the estate from one person to another. This organization functioned to maintain the plausibility of the initial definition of property in terms of "absoluteness" and physicality. Because Book II *in fact* contained much more than the definition suggested it ought to, Blackstone deployed a series of devices that made rules about social relations appear to fit the person-thing schema he had developed in his history of land law. We will examine three of these devices: the reification of estates in things, the reification of contract, and the reification of incorporeal hereditaments.

In each case, I will argue that the technique of reification made it possible to treat a collection of quite disparate rules as though they fell together naturally into a group with a single theme. But I do *not* mean to argue that the technique *produced* the groups, or determined what would fall within them. Estate, chose in action, and incorporeal hereditament were traditional, familiar legal concepts. Blackstone probably used them because Hale had used them. What the reifying technique did was to *rationalize* the pre-existing organizational scheme. The choice of a mode of rationalization made it possible to represent the law as a whole in a particular way, as we will see when we take up the general distinction between person-person and person-thing relations.

#### (a) *The Reification of Estates*

The easiest of Blackstone's devices to understand is that by which he transformed the relation between several co-owners of land into a series of separate relations between each of them and some "division" of the object in space or time. He organized his presentation of both real and personal property law around the distinction between "the nature of that *property*, or dominion, to which . . . [a given set of objects] are liable" and "secondly, the *title* to that property, or how it may be lost and acquired." [II-388] An estate was "the condition, or circumstance, in which the owner stands with regard to his property." [II-103] Estates were subdivisions of things; title governed their transfer from person to person. [II-195]

*The Gilbert Law Summary: Real Property* for 1977 contains the following, on page one, § 6:



[E]states as "things" (reification of abstractions) . . . the estates became reified and thought of as "things." They were given the characteristics and qualities of things having a real existence, rather than merely being regarded as abstract concepts. The law of estates is filled with metaphors which assume that estates are "things." For example, title "passes"; life estates "merge"; contingent remainders are "destroyed."

While the anonymous author is quite right to deny that an estate is a thing, it is by no means clear what is meant by calling it an "abstract concept" instead. The rules defining an estate define a set of relations among people with respect to a thing. The problem with reifying the estate is that it makes it hard to keep in mind that these rules are (a) the product of a legislative—that is, social—process, and (b) that they relate people to one another in patterns of domination and submission. This effect occurs in part because the "metaphorical" language used to *describe* particular rules gives the impression of also *explaining* them:

[T]he remainder must vest in the grantee during the continuance of the particular estate, or *eo instanti* that it determines. . . . And this depends upon the principle . . . that the precedent particular estate, and the remainder, are one estate in law; they must therefore subsist and be *in esse* at one and the same instant of time . . . . For there can be no intervening estate between the particular estate, and the remainder supported thereby: the thing supported must fall to the ground, if once its support be severed from it. [II-168]

As Blackstone's own discussion of entails showed, the activity of defining the "possible" estates in "things" involved granting to individuals particular measures of power, backed up by collective coercion, to dominate other people. The notion that estates merely defined relations to things made it possible to treat this process as determined by, or at least flowing from, the "natural" subdivisions or characteristics of the objects and owners involved.

Thus Blackstone classified estates in land, "*first*, with regard to the *quantity of interest* which the tenant has in the tenement: *secondly*, with regard to the *time* at which that quantity of interest is to be enjoyed: and, *thirdly*, with regard to the *number* and *connexions* of the tenants." [II-103] The rule that a life tenant cannot waste the premises could then be made to follow from the "nature" of the estate: "the destruction of such things as are not temporary

profits of the tenement, is not necessary for the tenant's complete enjoyment of his estate." [II-122] In his discussion of estates in personal property, he argued that the complex rules governing interests in different kinds of wild and domestic animals, and the rules about easements of light, air and water, all "depend upon the peculiar circumstances of the subject matter, which is not capable of being under the absolute dominion of any proprietor." [II-395. See also II-18, 419] Thus he reduced what we see as crucial issues of "social policy" concerning what may be property, and to what extent, to the analysis of the qualities of objects.

Many of these usages, which permitted Blackstone to make the law of co-ownership and partial ownership continuous with the law of absolute dominion, continue into our own day. They have survived in part because of the inertia that overcame real property law after the 19th century thinkers had clearly segregated it, as a domain of anomalies, from the major fields of contract and tort. But they also survive because the distortion they involved was *relatively* minor. The estate/title distinction required that one think of a limited right to control a specific thing as analogous to an absolute right to control the same sort of thing. In each case, what was involved was an actual thing, and genuine property rights, valid against all the world and vindicated by actions for restitution.

The reification of estates suppressed awareness that the mutual rights and duties of the co-owners constituted a network of social relations analogous to the more complex feudal system. It represented this network accurately enough, but through the lens of the relation of each co-owner to the underlying thing. Such an extension of the person-thing schema was not counterintuitive: it moved from property as thing to property as right in thing, without even approaching the full abstraction of property as any right at all. The reification of contract was quite a different matter.

### (b) *The Reification of Contract*

Blackstone's chapters on contract were formally concerned with title to things personal not in possession. But in fact he there described most of the contract types with which we are familiar, and he definitely did not restrict himself to those involving chattels. The issue is not whether he could *conceive* of contracts involving only persons, but how and why he chose to misrepresent them, in

spite of his own general definition in terms of "agreement . . . to do or not to do a particular thing." [II-442]<sup>44</sup>

The misrepresentation was perhaps least glaring in the case of bailment, which he defined as "a delivery of goods in trust, upon a contract, express or implied, that the trust shall be faithfully executed on the part of the bailee." [II-451] When the bailor gave cloth to a tailor to make into a suit, or delivered goods to a shipper for carriage to a distant point, it was easy to conceive of their agreement as defining a nonpossessory right in the bailor to the specific thing he had parted with: "there is a special qualified property transferred from the bailor to the bailee, together with the possession. It is not an absolute property, because of his contract for restitution; the bailor having still left in him the right to a *chose* in action, grounded upon such contract." [II-452-53. See also II-396] The bailor even retained the right to sue third parties who "injure or take away these chattels." [II-453] He was very close to being an owner.

A contract by which A buys a particular object, say a horse, from B, giving cash in exchange for a promise of future delivery, also fitted the schema well. The buyer "owned" the goods, but had no present right to possess them. [II-446-47] The same analysis worked for chattel leases, which gave the lessee a possessory right, but did not extinguish the property of the lessor. [II-453] Indeed, the analysis in terms of nonpossessory property rights worked so well in these three relatively simple cases that it is hard to see the function of the *chose* in action concept. Blackstone himself, in his discussion of *estates* in personal property, explicitly mentioned the "qualified property" of the bailor, and of the holder of a security interest in chattels. He might there have included the interests of the lessor of chattels and of the buyer waiting for delivery, and made the treatment of personal property analogous to that of real. Estates in land were either "in *possession* or in *expectancy*." [II-163] The landlord had an estate in reversion [III-175], the mortgagee an "estate on condition." [II-157]

The problem with such an approach was that Blackstone wanted to treat as person-thing relations not only bailment, chattel lease and sale, but also other contract types that it would have been more difficult to conceive as creating estates. The *chose* in

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44. Contrast M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860* at 161-73 (1977) with Waterman, *Mansfield and Blackstone's Commentaries*, 1 U. CHI. L. REV. 549, 561-68 (1933).

action was a thoroughly ambiguous kind of "thing," and it served the purpose of blurring the issue of the actual character of the supposed physical referent of the right in question. For example, Blackstone's fourth typical contract category was debt, "whereby a *chose* in action, or right to a certain sum of money, is mutually acquired and lost." [II-464] This type of *chose* in action was different, as Blackstone was well aware, from the other three, in that the creditor acquired no "qualified property" in any "thing" in the possession of the debtor. Indeed, the creditor's rights were meaningless in the case of insolvency, and subject, if the debtor was a merchant, to extinction by bankruptcy. [II-485-89] There was a "right to a certain sum of money," but the right was a mere obligation; there was no passage of "title" to "property."

Blackstone dealt with this difficulty by simply ignoring it. He avoided using "title" in his initial description of the kinds of debts, and used the word "obligation" instead. [II-465-66] When he came to speak of negotiable instruments, he switched to the usage of the word "property" in which it meant simply "right":

The payee, we may observe, either of a bill of exchange or promissory note, has clearly a property vested in him (not indeed in possession but in action) by the *express* contract of the drawer in the case of a promissory note, and, in the case of a bill of exchange, by his *implied* contract . . . And this property, so vested, may be transferred and assigned from the payee to any other man; contrary to the general rule of the common law, that no *chose* in action is assignable: which assignment is the life of paper credit. [II-468]

The "property" in question was a right, but it was a right to seize the appropriate sum from the general fund of the debtor's assets, or to have him imprisoned, if he did not pay voluntarily [III-414-21], and it was not valid against all the world, since Blackstone recognized no action for interference with nondomestic contractual relations.

Debt was a kind of transitional case, between contracts that really did create nonpossessory rights in specific objects and contracts that created rights to performances not involving things.<sup>45</sup> "A sum of money" owed is much easier to reify than a "promise to babysit next week." Blackstone dealt with these more difficult cases in part simply by banishing them to Book I. Thus he clearly

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45. The subsequent history of debt as an intermediate term is discussed in Katz, *supra* note 5, second essay.

recognized the contractual nature of marriage and employment, but treated them as relations. Contracts "usually," not "always," create choses in action. He was unwilling, however, to make any such concessions with respect to the great mass of nonrelational service contracts. He had therefore to develop an argument that would fit the rights of the promisee within the nonpossessory person-thing schema.

When the promisor breaches, but there is no particular piece of property whose restoration to him will make the promisee whole, contract law provides an action for damages, that is, compensation for the injury caused by the breach. In a system like ours, that freely acknowledges the personal character of contractual obligation, this solution seems so obvious that it needs no explanation. Breach is an injury done one person by another; compensation through the handing over of some physical object involved in the transaction is a special case within the more general category of contract damages.

What Blackstone did was to reverse this way of looking at the situation. The contract that established a right of restitution was the norm (bailment, lease and partially executed sale). Debt represented a minor deviation because there was no thing to restore, but the chose in action was the sum of money owed. Our "normal" service contract was a more extreme deviation: the only "thing" involved was the promisee's unliquidated claim to money damages *if* the promisor should breach. Making *this* into the physical referent of a chose in action required the following contortion:

Thus money due on a bond is a *chose* in action; for a property in the debt vests at the time of forfeiture mentioned in the obligation, but there is no possession till recovered by course of law. If a man promises, or covenants with me, to do any act, and fails in it, whereby I suffer damage, the recompense for this damage is a *chose* in action; for though a right to some recompense vests in me at the time of damage done, yet what and how large such recompense shall be, can only be ascertained by verdict; and the possession can only be given me by legal judgment and execution. In the former of these cases the student will observe, that the property, or right of action, depends upon an *express* contract or obligation to pay a stated sum: and in the latter it depends upon an *implied* contract, that if the covenantor does not perform the act he engaged to do, he shall pay me the damages I sustain by this breach of covenant.

[II-397]

The "covenant to do any act" was express, yet the action to recover damages for its breach was on a subsidiary implied contract to pay money. The express contract could not itself create a chose in action, because it was an agreement "to do any act," rather than to hand over some physical object. The implied contract to pay damages, on the other hand, *could* be seen as involving an object (in the same sense that other debts were objects), and its interpolation preserved the unity of contract law as a branch of person-thing relations. [See II-397,438] This would seem so strained as to be an implausible reading, were it not that Blackstone included this particular implied contract in a listing whose other items were things like the implied obligation to pay a tradesman reasonable value if I order goods from his shop without fixing the price. "[T]here is also one species of implied contracts, which runs through and is annexed to all other contracts . . . viz., that if I fail in my part of the agreement, I shall pay the other party such damages as he has sustained by such my neglect or refusal." [II-443]

Given such an interpretation, any contractual obligation that can give rise to an action for money damages fits the person-thing schema, because the money damages that will become due on breach are a "thing not in possession" "owned" by the promisee. But we are no longer talking about "property" in any other sense than "right" in the abstract. Blackstone preserved his schema at the price of rendering it useless as a way to distinguish one kind of relation from another. He was thereby able to include, not in his initial discussion but in that of "wrongs" to contract rights, the "class" of implied obligations by which "every one who undertakes any office, employment, trust, or duty, contracts with those who employ or entrust him, to perform it with integrity, diligence, and skill. . . . And, if by his want of either of those qualities any injury accrues to individuals, they have therefore their remedy in damages by a special action on the case." [III-163] Actions for damages for breach of warranties of title or fitness were likewise within the person-thing schema, once the damages could be the "thing" in question. [III-166]

The puzzle about Blackstone's treatment of contract is *not* "how could a late 18th century writer have had such a narrow and primitive conception of the subject matter?" Given the fiction that an unliquidated damage claim is a thing, his conception was

no narrower or more primitive than our own. Indeed, given the fiction, he could have included both marriage (alimony is the chose in action) and master/servant in his discussion of "such wrongs as may be offered to personal property" without the slightest inconsistency. He might have gone even further and included all of tort law under the contract heading, reasoning as follows: My right of bodily security means that I can recover damages for personal injuries; tort rules therefore give me a "title" by implied contract to multiple choses in action which are temporarily in the possession of all those who might violate my right. What is puzzling is that he was so determined to reify relations among persons, and that once he had devised a way to make them look like person-things relations, he stopped short of including *all* obligations in the same category.

Part, but only part, of the answer lies in the fact that Blackstone had *other* ways, such as the estate/title distinction, to make social relations look like relations to things, and used them in constructing Book II. The most striking of these was the division of "things real" into the two categories of corporeal and incorporeal hereditaments.

### (c) *The Reification of Incorporeal Hereditaments*

Blackstone's introduction to the discussion of the classification of real property is probably the most confusing piece of writing in the *Commentaries*. [But see the later discussion of "chattels real," II-389-91] He began by distinguishing real and personal property: "[t]hings *real* are such as are permanent, fixed, and immoveable, which cannot be carried out of their place; as lands and tenements: things *personal* are goods, money, and all other moveables." [II-16] But he then pointed out that real property included not only land and tenements, but all "hereditaments," a "comprehensive" term covering:

not only land and tenements, but whatsoever may be *inherited*, be it corporeal or incorporeal, real, personal, or mixed. Thus an heir-loom, or implement of furniture which by custom descends to the heir together with a house, is neither land, nor tenement, but a mere moveable: yet being inheritable, is comprised under the general word hereditament: and so a condition, [e.g. title of nobility], the benefit of which may descend to a man from his ancestor, is also an hereditament. [II-17]

What this meant was that whether or not a given interest was part of real property had nothing to do with whether it fit Blackstone's definition in terms of "fixity." A right was real property so long as the courts applied to it the rules of descent, transfer, and vindication of possession that they applied to land. *Corporeal* hereditaments were a special subclass of this larger category, consisting "wholly of substantial and permanent objects; all of which may be comprehended under the general denomination of land only," [*Id.*] land being broadly defined to include buildings, air, water and subsoil. "Incorporeal hereditaments" was the other division of the "kinds" of things real, and it included all the cases that were problematic from the point of view of the initial fixity criterion. There were twelve of these: "advowsons, tithes, commons, ways, offices, dignities, franchises, corodies or pensions, annuities, and rents." [II-21] As with choses in action within the law of personal property, it took some doing to show that this odd assortment was appropriately part of the "rights of things":

An incorporeal hereditament is a right issuing out of a thing corporate (whether real or personal) or concerning, or annexed to, or exercisable within, the same. It is not the thing corporate itself, which may consist in lands, houses, jewels, or the like; but something collateral thereto, as a rent issuing out of those lands or houses, or an office relating to those jewels. In short, as the logicians speak . . . incorporeal hereditaments are but a sort of accidents, which inhere in and are supported by that substance; and may belong, or not belong to it, without any visible alteration therein. Their existence is merely in idea and abstracted contemplation; though their effects and profits may be frequently objects of our bodily senses. And indeed, if we would fix a clear notion of an incorporeal hereditament, we must be careful not to confound together the profits produced, and the thing, or hereditament, which produces them. An annuity, for instance, is an incorporeal hereditament: for though the money, which is the fruit or product of this annuity, is doubtless of a corporeal nature, yet the annuity itself, which produces that money, is a thing invisible, has only a mental existence, and cannot be delivered over from hand to hand. [II-20]

From our point of view, there is nothing wrong with applying the real property rules about conveyancing and succession to annuities and heirlooms, so long as there is some reason for choosing those rules rather than the ones that apply to personal property. But it is absurd to claim that these various items have in common that they are "invisible things." Whereas for estates and choses in action it requires an effort for us to see the fictional character of



the asserted person-thing relation, here Blackstone's language suggests that he himself had difficulty maintaining appearances. Yet he labored mightily to do so. Before we try to say why, we need some idea of the characteristics of the rights he included in this bizarre category.

Four of the kinds of incorporeal hereditaments—commons, rights of way, rents and tithes—involved real property; and they gave their owners rights in the use or profits of land that might be vindicated by court decrees directly affecting the control of the land in question. The only thing problematic about these interests was that there was no obvious reason why they should not be categorized as "estates." Such a usage would not have strained the fiction that an estate is a "thing," and it would have made commons, ways, rents, and tithes less conspicuous as instances of less than complete dominion.

The following seems to me the likely explanation. All the recognized estates create an interest that can be seen as a fraction of an *undifferentiated* substance called absolute dominion. Remaindermen and reversioners have interests that can be conceived as potentially absolute. Life tenants can be seen as absolute owners for life. The various kinds of cotenants *share* dominion, but there are no distinctions made among them with respect to power over the land. Commons, ways, rents, and tithes, by contrast, involved an internal differentiation of powers and functions: they specified a pattern of social activity with respect to land, rather than merely saying what person or persons should control the land at a given moment.

The other kinds of incorporeal hereditaments fit this reasoning to one extent or another, and most of them have something else in common as well: namely, that they are forms of property connected to the various social establishments that Blackstone listed in the part of Book I on the relative rights of persons. (For example, advowsons, corodies and tithes were types of property connected with the church.) Because they were means to the enforcement of the *relative* rights of persons, these different kinds of property were bound up with the performance of the patterns of reciprocal right and duty that the underlying relationships implied. To describe them as "estates" in things would have violated the notion of absolute dominion even more glaringly than would such a description of a right of way. On the other hand, some appearance of absoluteness remained, so long as one could divorce

them from their "corporeal" base and reify the rights themselves.

There was a second problem with this group. *Some* of them could be seen as "issuing out of a thing corporate," but some could not. An advowson, for example, was the right to choose the parson for a church. It was certainly property, in the fully abstract sense in which *any* right is property; and it was a right *in rem*, in the sense of giving tort rights against all the world. But it was not *itself* a thing in any sense, nor could it be vindicated by a restitutionary remedy. It had a physical referent in the church land and buildings, but it turned out that this was not essential to its classification as an incorporeal hereditament. Once Blackstone had established that things could be invisible, he pressed his advantage and included rights without any physical referent at all.

First, tithes, corodies, and annuities were rights to money payments (tithes being *both* a share of produce and of income). Blackstone himself pointed out that corodies and annuities were "right[s] of sustenance," "though not chargeable on or issuing from any corporeal inheritance, but only charged on the person of the owner in respect of such his inheritance." That is, they gave rise merely to obligations, but passed, like real property, to heirs rather than executors. In the case of an annuity, "a man may have a real estate in it, though his security is merely personal." [II-40] If such an interest was an incorporeal thing, the same might be said of any contract right.

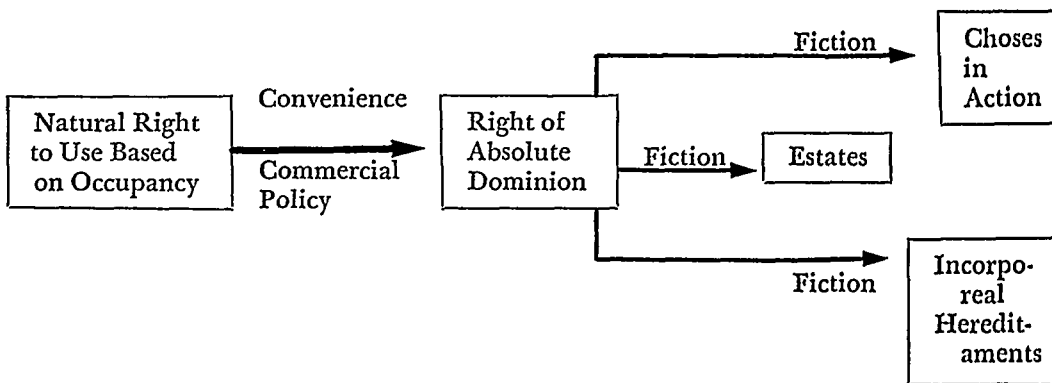
Second, in the cases of franchises, offices, and dignities, there was not (necessarily) even the transitional fictional entity of a sum of money due. It was a franchise "for a number of persons to be incorporated, and subsist as a body politic," [II-37] no matter what the functions of the corporation. Offices might have no tangible referents, and dignities *could* not have any. An injury to this species of property, for example by setting up a rival to a franchised market or fair, gave rise to damages through an action on the case. [III-219, 236] The same writ could be used to recover damages for loss of the "property which the master has by his contract acquired in the labour of the servant." [III-142] Likewise, husbands and fathers had rights against the world in their wives and children. [III-139-41] Yet none of these were incorporeal hereditaments.

In short, Blackstone extended the reifying device of treating social relations as incorporeal hereditaments from rights establishing a network of separate functions in the control of land, to rights

defining the hierarchy of social superiors, and finally to economic advantages based on state grant (franchises) or contract (annuities). But he did not choose to reify *all* rights by turning them into incorporeal hereditaments. As with the notion of an estate and that of a chose in action, the extension of "incorporeality" to relations that were obviously social seems erratic and almost random. Blackstone persistently developed definitions in terms of things. He then argued tenaciously that he could include within those definitions rights that had less and less connection with physical referents, in the process producing fictions, like the unliquidated damage claim as chose in action, or the title of nobility as invisible thing issuing out of another invisible thing. Yet no one of the fictions extended to swallow all the others. Nor did Book II swallow Book I, within which all rights were aggressively asserted to relate person to person, rather than person to thing.

### C. *Reification as a Legitimater of the Status Quo*

One way to understand Blackstone's treatment of the rights of things is in terms of a progression that might be diagrammed as follows:



The natural right to use was founded on "reason" and the "law of nature." Absolute dominion over external things was founded on "convenience," in order to prevent disorder and encourage industry, and on the "policy" of reducing personal servitudes annexed to land ownership so as to stimulate commerce. The language of absolute dominion involved a distorting focus on

the person-thing relation, rather than on the owner-state and owner-nonowner relations created by this particular legal form.

Confronted with the phenomenon of partial or co-ownership, Blackstone maintained this distorting focus by reifying estates. He thereby made co-ownership look like a species of absolute dominion, but changed the meaning of property from right *to* a thing to right *in* a thing. He then developed a second and a third fictitious thing to deal with cases that stretched the estate notion. Choses in action and incorporeal hereditaments were reifications of relations among persons that had only tenuous physical referents, or no such referents.

While these two last categories were similar in that they involved reification in an extreme form, they were also significantly different in content. Almost all the incorporeal hereditaments have a "feudal tincture," as Blackstone might have put it. Advowsons, tithes, corodies, commons, dignities and offices, the different kinds of rents, and royal franchises were the characteristic legal institutions of the pre-liberal hierarchy of social orders. They were the legal skeleton of a society in which public and private roles, property and jurisdictional rights, were fused or blurred into one another. They quite obviously involved state prescription of elaborate patterns of social interaction, sometimes focused on physical objects, but sometimes not so focused, as in the case of franchises to hold manorial courts or to do business as a corporation. [II-37]

When objects *were* involved, their control through incorporeal hereditaments reflected a decision to split up power among the members of a complex, hierarchical social network. The advowson gave the lord of the manor the right to nominate the parson, but no right to control church property; rights of common distributed the various benefits of land ownership between the lord of the fee and the other members of the community. By contrast, remainders and other future interests, though not corporeal in any meaningful sense of the word, had in common with outright ownership that they looked to a situation in which the object would be under the total control of a single individual.

It is plausible, then, that the corporeal/incorporeal distinction played somewhat the same role as that between rights and wrongs. It allowed for the segregation of a group of rules and institutions that were incompatible with the liberal conception of rights as areas of autonomy starkly confronting the sovereign

powers of the state. But before we make too much of this interpretation, we need to account for the similarities and differences between corporeal hereditaments and choses in action. The system of contract law *also* created complex social networks. It also involved the indirect use of state power to enforce relationships of domination and submission. But where hereditaments looked backward to the hierarchies of the feudal order, the chose in action was the instrument of the emerging liberal order of formally equal rights of private individuals, enforced by a neutral state.

It was already true, to Blackstone's mind, that "by far the most considerable species of personal property" was "that which consists in action merely, and not in possession." [III-166] He listed among the chief improvements in English law during the 18th century "the introduction and establishment of paper-credit, by indorsements upon bills and notes, which have shewn the legal possibility and convenience (which our ancestors so long doubted) of assigning a *chose in action*." [IV-441] Yet Blackstone was diligent to show that this mode of organizing production and distribution by delegating state power to capitalists was just another instance of the creation of person-thing relations.

In other words, reification allowed him to assimilate *both* the remnants of the feudal mode of organization and the emerging elements of the liberal mode to the model of the landowner controlling his land. This in turn allowed him to maintain the illusion that the long process of abolishing the feudal "servitudes" had been, in essence, one of social *decontrol*, of the growth and institutionalization of freedom. Given the premise of the convenience of absolute dominion, and the fictional entities of estate, hereditament and chose in action, the rules of the property system could be seen as flowing "naturally" from the characteristics of objects.

If we restrict our attention to the law of things, it is tempting to conclude that Blackstone was interested in denying that people acting socially create and control their own institutions. We could interpret him as using the person-thing schema to deny both that there were many possible ways to organize social relations and that the existing method involved authorizing the exercise of power. The reification of feudal property through the idea of an incorporeal hereditament obscured its hierarchical basis; the reification of contract through the idea of a chose in action obscured the emergence of a rival liberal hierarchy based on the power of money. In this view, Blackstone had much in common with the

classical liberal theorists of laissez-faire and legal formalism, who attempted to portray the 19th century legal/economic order as at once inevitable, neutral as between social classes, and benign.<sup>46</sup>

There is a good deal to be said for this analogy, so long as we keep in mind that it is no more than an analogy. Blackstone's law of things was in a number of ways the equivalent of the liberal theorist's private law of abstract individual rights. Within the law of things, as within the law of private rights, there were no distinctions of status. Blackstone answered the question "who is capable of conveying and who of purchasing" real property by a list of exceptions: persons attainted of treason, aliens, lunatics and *femes-coverts* were incapable; everyone else could buy or sell anything. [II-290] Just as the liberal private law of rights was an area of formal equality and free individual self-determination, through which people spontaneously created their own social universe, Blackstone's law of things appeared largely independent of state intervention; the person-thing relation was outside the domain of social control.

Yet the two schemes are by no means identical. The creation of the liberal category of private law, with its internal dichotomy of contract versus tort, required the dismantling of Blackstone's large category of "things," and the relegation of the law of real property to the status of an anomalous, technical subfield with little theoretical or analogical influence on other areas of law. Rather than providing the core examples of a predominant person-thing schema, property little by little became a backwater composed of rules that were hard to fit into the 19th century's contractual and delictual models of obligation.

The sharp opposition of person-person and person-thing relations differed in two particularly important ways from the equally stark contrast of state power and individual freedom. First, the liberal duality accepted the element of violence inherent in government, identified it clearly in particular legal institutions (public law in general; tort law within private law), contrasted it with individual freedom, and then proposed to rationalize it through a logically coherent structure of rules for the protection of rights. Blackstone, by contrast, squarely confronted the problem of state power only in the early chapter on the absolute rights

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46. See Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1728-31, 1745-51 (1976).

of persons. Forever after, he minimized or wholly suppressed the state-individual opposition, using techniques of mediation which we will examine in the next part. The law of things stood opposed, as a domain of abstract individual freedom, not to the state, but to the law of the relative rights of persons, the domain of hierarchically arranged relationships of person to person.

This brings us to the second crucial point of difference between Blackstone and his successors. They were to claim that the law was essentially neutral as between persons. Within the state, there was or should be equality of political rights; within private law, there was formal equality of individual legal capacities. By contrast, if we again except the twenty pages on absolute rights, Blackstone's law of persons contained *only* relations of formal inequality, such as king and subject, noble and commoner, pastor and parishioner, husband and wife, master and servant. His structure suggested that the human universe could be divided into two parts: a world of hierarchically ordered relations of people to one another, and an egalitarian world in which people dominated objects. The function of this odd procedure was to legitimate the status quo. It allowed Blackstone to maintain that it was *only* in the social world of accepted, hierarchically arranged roles that the law was the instrument of personal domination. He granted that law involved violence, but by the sharp segregation of persons and things he was able to maintain that it was violent only in order to uphold the institutions of royalty, the established Church, and the extended family consisting of spouses, children, and servants. Beyond that, it merely ratified man's control over nature.

A measure of reification, the swelling of the law of things to include incorporeal hereditaments and contracts, was necessary to this purpose because it allowed Blackstone to deny that the law as a whole was committed either to a feudal or a liberal policy of social control. With both extreme types of property assimilated to the person-thing schema, there was nothing within the law of persons that contradicted the image of an organic whole composed of roles well ordered according to an uncontroversial rational scheme. The power of the feudal lords and that of modern merchants were alike incompatible with hierarchical good order, but both were given a kind of invisibility when it was denied that their characteristic forms of property had anything to do with social relations.

## PART FIVE

## BLACKSTONE'S CONCEPTION OF CIVIL SOCIETY

In Part II of this essay, I argued that Blackstone's distinction between rights and wrongs performed two functions. It allowed him to develop arguments that legitimated the existing system of forms of action, pleading, and separate jurisdictions. And it was also a contribution to the development of the liberal mode of mediating the fundamental contradiction. By subordinating remedies to rights, he made it plausible to view the whole legal system as a derivation from the fundamental principles enunciated by liberal political theory. Yet, at the same time, this structure was false to liberalism: it made individual rights the fountain not of state powers but of the *judicial* power to elaborate legal remedies. It represented rights as including the legislative and executive apparatus of the state rather than as opposed to it.

In Part III, we examined the distinction between absolute and relative rights of persons, but from a more limited perspective. I developed the argument that this distinction permitted Blackstone to legitimate a set of hierarchical social institutions, including both the state apparatus itself and the established entities of royalty, church, nobility, workplace, and family, by appeal to the very individual rights that they arguably subverted. Absolute rights were primary; relative rights flowed from them by arguments of convenience and implied consent. In Part IV, we traced Blackstone's similar but distinct derivation of property rights. Like relative rights, these rested on convenience and implied consent rather than being either natural or absolute. But the argument of Book II was egalitarian rather than hierarchical.

Both in the discussion of "persons" and in that of "things," my purpose was to show the process of legitimation, rather than that of mediation. We have now to add this final dimension to the interpretation of the *Commentaries* as an incident in the history of the fundamental contradiction. My purpose here is thus analogous to that of the last section of Part II, where we were concerned with Blackstone's place in relation to liberal theorists like Locke or Hobbes, rather than with his role as an apologist for the bizarre legal procedures of an earlier age. And, as in that earlier discussion, my goal is to instantiate the general notion of a con-



nection between the task of apology and that of elaborating the liberal paradigm.

Stated abstractly, the model of such a connection is simple: In order to assimilate particular existing institutions to the liberal paradigm, and thereby legitimate them, it is necessary to reconceive them; this is one half of the development effected by the legal theorist. But the assimilation of new institutions also requires the thinker to change the paradigm itself, in order to accommodate their irreducible particularity; and this is the other half of the development. In the case of the right/wrong distinction, Blackstone irreversibly transformed the remedial system by reconceiving it as derivative from rights rather than as an entity with its own inherent logic. At the same time, the assimilation of this unfamiliar, technical legal domain transformed the simpler 17th century paradigm of confrontation between sovereign and citizen into a full-fledged theory claiming the power to explicate all instances of state force.

It is easy to see the parallel between what Blackstone did with wrongs and what he did with relative rights. In each case, the juxtaposition of a mass of arguably anachronistic, anti-liberal institutions to unquestionably legitimate liberal rights made it possible to perform the task of legitimation. In the case of wrongs, the derivation was from *all* rights, public as well as private. In the case of relative rights, the derivation was from the smaller class of "absolute" rights. In both cases, the legitimating process transformed the object legitimated. The parallel to the disintegration and reconstitution of the remedial system was the *relativization* of the system of mixed government and established social institutions. Blackstone justified them only in terms of convenience and implied consent. They were neither "natural," nor the result of divine law, but merely instrumental to the purposes of individuals.

His treatment of property rights fits the same model. The 18th century English law of property was enormously complex and quite patently artificial. Blackstone did not try to defend it as straightforwardly rational. Rather, he derived both absolute property rights in general and the plethora of disguised forms of limited property from the natural right to use, based on occupancy, through the notions of convenience and the commercial policy. He dealt with perplexing subrules by the devices of implied consent and reification we have examined.

Blackstone was not "original" with respect either to hierarchy or to property. The 17th century liberal theorists, and Montesquieu, Hume, and Rousseau in the 18th century, had shown that one could derive the fundamental institutions of the state and private property from reflection on individual rights in the state of nature. Blackstone's *general* arguments for mixed government and for property in the abstract were wholly derivative from the Enlightenment political philosophy of his day.

Furthermore, his version of the liberal theory of public and private dominion was, because of its intensely apologetic character, destined for a short life even in the country where it had the largest impact. The American revolutionaries did away with hereditary monarchy, nobility, and the *established* church. The relations of master and servant and husband and wife have undergone transformations no less profound (though less dramatic). But it is also important to realize how different is our understanding of contract, tort, and property from Blackstone's. His reifications survive only as curiosities in courses on real property law.

Yet in spite of his banality, and in spite of the long-term implausibility of his apologetic routines, Blackstone was an important contributor to liberal *legalism*. In so much as the liberal mode was ultimately dependent on mediation through the rule of law, his work was pivotal: it was the beginning of the tradition of scholarship designed to convince the lawyer class, and vaguely reassure the public, that all was well in the crucial legal bailiwick.

The generalities of Locke or Montesquieu were brilliant, but hollow. Blackstone was incapable of going beyond them, but he was the first to fill in the ground behind them. We have seen already that, in the case of the remedial system, this involved a massive effort of detailed resynthesis. The same was true for the relative rights of persons and the rights of things. It was one thing for Locke to equate rights with men's "Lives, Liberties and Estates, which I call by the general Name, *Property*,"<sup>47</sup> and then derive popular sovereignty and legislative supremacy from the necessity of protecting that generality. Blackstone's apologetic purpose meant that he had to derive not "the state," but the details of mixed government. It was one thing to bootstrap private property from communal ownership in the state of nature, but quite another to carry the theme into the distant region of estates, choses in action, and incorporeal hereditaments.

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47. J. LOCKE, *supra* note 8, at § 123.

It was not just that Blackstone did all of this. There was a good deal of importance (again, for liberal *legalism*) in the way he did it. The extension of the vague generalities of natural rights theory into a detailed treatment of the system as a whole brought Blackstone up against the extremely problematic character of *any* attempt to render the rules consistent with one another. In other words, he had to deal with the fundamental contradiction in myriad particular instances. Each of these instances was a threat to the plausibility of the political theory that set him at work, because that theory depended on the plausibility of the idea of the state protecting rights through legal processes. The legal theorist, to whom the grand theorist paid no attention at all, was the scullery maid who made it possible for him to set a good bourgeois table.

As we will see, Blackstone went about his drudge work with a will. He deployed the set of reasoning techniques with which we are already familiar, and he also formulated, through the notion of "civil society," a general version of the apparent conflicts within the system of rights viewed as a whole. The purpose of this part is to examine these aspects of the *Commentaries*. But, before we begin, we need enough of a view of the later development of liberal legal reasoning to put him in context as a contributor.

### A. *The Problem of the Definition of Rights*

In earlier parts of this essay, I have argued that liberalism is a mode of mediating the fundamental contradiction between our need for incorporation with others into groups and our fear of domination by them. The split vision of the universe of others allows us to mediate or deny the contradiction by affirming our rights. So long as other private individuals respect those rights, we fuse with them without fear of domination. The role of the state is to make this good fusion possible by imposing rights through collective force. In the process, it provides us a second domain of fusion: so long as it respects our rights as citizens *against itself*, we participate, directly in its electoral, and imaginatively in its legislative, executive and judicial activities, without fear that it will become a center of power as threatening as other individuals.

As a form of utopian social thought, liberalism asserts the *possibility* of escaping contradiction in this way. As apology, it asserts that the actual conditions of social life have abolished con-

tradition in reality. To make either assertion plausible, liberalism must offer solutions to a series of problems that seem to reproduce its dilemmas within the way of thought designed to mediate them. We have seen already that doctrinal structures iterate the contradiction at every level of the liberal mode of understanding law. If there existed a set of principles that allowed us to fit each fact situation into one doctrinal category or another, and thereby generate the result that "protects rights," the liberal mode would successfully mediate as well as express it. Liberal legal thought has been mainly preoccupied with simultaneously elaborating the structures and discovering such principles. As the categorizing activity gradually reduced the chaos of fact situations to order, there was a paradoxical fading of hope that the necessary principles for deciding them could exist.

### 1. *Private Law: The Conflict of Right with Right*

Liberal thinkers express the problematic character of the search for principles in private law through the notion of a "conflict of rights." If rights are to mediate, the rule of law must be able to resolve the conflicting claims of the parties to a dispute that each is within his rights. The paradigm is extremely simple: A, the stronger, hurts B, the weaker, who calls in the state because he can't obtain redress on his own. A admits the facts, but asserts that the injury to B is not compensable because he was exercising his right to freedom of action; to make him compensate B for what he did would give B an illegitimate power to dominate him in the future. B answers that he had a right to be secure from injuries of the type A has inflicted; if the state does not force A to respect this right, A will be in a position to impose his will illegitimately in the future.

The conflict of rights occurs at every level of the legal system, at least as liberalism conceives the system. The rights may have to do with land use (easements), with bodily security (strict liability versus negligence) or emotional tranquility. They may arise from contractual arrangements (excuses for breach), or in complex relationships falling short of formal contract (promissory estoppel). The schema of conflict is tautologically broad: there is *no* private legal dispute we cannot cast in terms of right against right. *If*, but only if, it can propose a way to resolve these conflicts, liberalism

can mediate the contradiction. The problem of private law would then be reduced to fact finding.

The slogan of equality of right represents a commitment *against* one possible way of defining rules to resolve these conflicts of rights. It excludes solutions based on the idea that there is a legitimate social hierarchy that the legal system ought to reinforce through the definition of private law rules. If one accepts the slogan, then it is not legitimate to resolve a dispute about land use by setting a rule that rich people, *as* rich people, will be allowed to deprive their poor neighbors of sunlight, but not vice versa. But the exclusion of solutions supportive of formally recognized social hierarchy does not tell us how to choose among the many remaining alternatives. To begin with, there is the choice between formal and substantive equality. We might permit the poor, *as* poor, to deprive the rich landowner of sunlight, on the ground that this will make them more equal in their substantive capacity to enjoy the good things of life. But even if we choose formal equality, and are confident that we can give that phrase a meaning in practice, conflicting claims about the true content of formally equal rights remain to be resolved.

Even given the prior exclusion both of formal inequality in the interest of hierarchy and of formal inequality in the interest of substantive equality, the impact on social life of the choice of rule definitions will be enormous. The formally equal players of the economic game have vastly different capacities; every rule affects their ability to exercise them, for good or ill. For example, the choice of a set of rules about duress in contract law, even though the choice is restricted to rules of formal equality, modifies the bargaining power and also the set of production incentives for every actor in the economic system.<sup>48</sup> Likewise the rules about the protection of business goodwill against competitors. The rules about the tort of intentional infliction of emotional harm might, if they were enforceable, modify every aspect of private social intercourse.

The first and simplest liberal technique for resolving private law conflicts of rights is for the judge to point to an agreement between the parties, a statute, or a common law precedent that has unequivocally settled the conflict in advance. In each case, this amounts to a claim that one of the parties has already voluntarily

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48. Hale, *Bargaining, Duress and Economic Liberty*, 43 COLUM. L. REV. 603 (1943).

relinquished the right she now asserts. In the case of contract, A has agreed not to exercise her freedom of action in such a way as to do the injury for which B claims compensation. Or B has agreed not to assert his right of security if A's action injures him. In the case of a statute, the consent is indirect: the social contract establishes the legitimacy of the legislative process. "Everyone" agrees that "majority rules," within the scope of the majority's powers.

Where the source for unequivocal prior resolution of the conflict is a judicial precedent, the consent is even more indirect. There is the argument that the legislature sanctions all judicial decisions that it chooses not to overrule. A second string to the bow, both for precedents and statutes, is that the parties knew before they acted or failed to act that the law fixed liabilities in a particular way, so that they have no basis for complaint when these rules are applied to them.

If the judge is to employ these appeals to consent effectively, he must be able to derive the resolution of the particular conflict of rights from the general norm previously agreed on. He accomplishes this derivation through the specifically legal techniques of "construing" contracts, "interpreting" statutes, and "discovering the holdings" of cases. These are the prototypical instances of legal reasoning as mediation of contradiction. When they are successful, they make the apparent conflict of rights disappear by showing that one party has simply mistaken his own intentions.

The apparent simplicity of this procedure hides real complexities. The mediation of conflicts of rights by appeal to consent won't work unless we also possess a technique for reasoning directly about conflicts of rights. Once we recognize this problem, we are caught squarely in the middle of the fundamental contradiction.

There are two reasons for the dependence of the consent argument on techniques for reasoning directly about rights. First, the mediating power of contract, statute, and precedent depend on the assumed legitimacy of the background rules within which we arrive at contracts, statutes, and precedents, that is, on the definition of the rights that we bargain away in consensual processes. The law must define the property rights of the parties before they can make an agreement about their exercise. Moreover, the law must define what A can do to B in the negotiating process before we can know that the agreement they reach is valid. Fraud, duress,

mistake, and subtler forms of inequality destroy the legitimacy both of contracts and statutes, and it would be circular to claim that the rules defining them can be settled in advance by agreement. It follows that the quintessentially legal technique of carrying out the will of some authoritative third party to the dispute presupposes rights as well as defining them.<sup>49</sup>

Second, there is the problem of gaps, ambiguities, internal conflicts, and cases of first impression within the authoritative corpus. These may be more or less numerous, but it is impossible to avoid them altogether. And the resolution of the issue of rights arising in a gap (or whatever) *may* decisively influence the future bargaining power of the parties to consensual processes, whether contractual or legislative. A successful technique of mediation of contradiction by appeal to rights must therefore provide explanations of how such cases are decided. In the absence of such explanations, it will be possible to argue that the state is an instrument by which some dominate others, rather than a neutral arbiter.<sup>50</sup>

Liberal legal theorists employ two distinct modes of legal reasoning that are supposed to resolve problems of the conflict of rights that arise in the background of consensual arrangements or in gaps within them. The first of these is to choose either the right asserted by A or the conflicting right of B, and then *deduce* a subrule that indicates clearly that one wins and the other loses. *Because* contracts are the product of free will, they must be based on a meeting of the minds. There can be no meeting of the minds without an acceptance by the offeree. Therefore there is no contract without an acceptance. The other mode is more complex because it makes a partial, oblique reference to outcomes, although not to the *particular* gains and losses that motivate lawsuits. It looks indeed to the total set of impacts of setting one rule or another for all private right holders. If the rule increases "social welfare," then "policy" requires that we adopt it. Thus the requirement of an acceptance is a good thing, because people will be better off if the law protects them from inconsiderate engagements.

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49. See Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978); Kennedy, *supra* note 24, at 1763-64.

50. See Dewey, *Logical Method and Law*, 10 CORNELL L.Q. 17 (1924). For particular examples, see, e.g., Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265 (1978); Rosenblatt, *Health Care Reform and Administrative Law: A Structural Approach*, 88 YALE L.J. 243 (1978).

It is common *within* liberalism to treat these modes as contradictory: one involves formal reasoning from rights as postulates; the other the consideration of the consequences of rights for social welfare. But it has gradually become clear that a skillful arguer can generate any given result from *either* scheme. Within the utilitarian mode of social welfare, there are two conflicting strategies, each of which can almost always plausibly resolve a dispute. One emphasizes the good effect of protecting people's welfare positions—protection gives an incentive to production. The other emphasizes the stimulus to effort generated by exposure to competition and adversity in general, which should also enhance production.<sup>51</sup>

There is the same ambiguity within the mode of reasoning strictly from individual rights, without reference to social welfare. On the one hand, one can postulate a sharp distinction between "law and morals," and begin with the right of freedom of action. On the other, one can emphasize the "absoluteness" of the right to security from interference by others.<sup>52</sup> The result is that there are not two but four different argumentative tacks available whenever the liberal theorist confronts a conflict of rights. Strict liability, for example, is good because "as between two innocents, he who caused the damage should pay" (rights as security), and *also* because it will "force activities to pay their real social cost" (social welfare). It is bad because it is "unfair to punish where there has been no wrongdoing" (rights as freedom of action) and because "society *wants* the injury to be inflicted if the burden of preventing it is greater than the discounted value of the loss itself" (social welfare).

The pattern of evolution of liberal reasoning techniques resembles that of the liberal doctrinal categories. The sharp differentiation between appeals to policy or social welfare and appeal to rights as postulates expresses the fundamental contradiction between the primacy of the group and the primacy of the isolated individual. Yet *within* each mode of reasoning the contradiction *reexpresses* itself: social welfare arguments emphasize either the desirability of individual autonomy or the importance of making individuals "internalize" their impacts on others. Likewise, within the rights perspective, there is fluctuation between freedom and

51. See Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935); Kennedy, *supra* note 24, at 1713-24, 1740-51, 1762-66.

52. See W. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays* (1923); Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553 (1933); Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1927).



solidarity in the definition of postulates. For any given factual conflict of rights, the doctrinal structure will offer a choice of categorizations; the techniques of reasoning that are supposed to tell us which choice to make will themselves reproduce that choice at another level.

It is important to understand that none of this makes it impossible to decide legal issues. The point is that it is not possible to distinguish the *legal* mode of defining rights from any other, in a way that will convince us that the rule of law is mediating the fundamental contradiction. According to the resolution of the conflict of right with right, we may find ourselves submerged and dominated by others, or perilously isolated from them. Neither the categories we employ nor our techniques of reasoning within them can reassure us that these dangers are illusory.

## 2. *Public Law: Right versus Power; Power versus Power*

Liberal public law doctrine supposedly flows logically from the definition of the state as the guarantor of private law rights. But if there is no internally coherent liberal theory of private law rights, it is difficult to see how liberal public law can be coherent either. There are many ways in which one might approach this problem, but for our limited purpose the most convenient is to divide public law doctrines into two groups: those that involve the definition of rights in right/power conflicts, and those that involve the conflict of power with power within the state. In a system like the American, most, though by no means all, such conflicts present themselves as issues for judicial review. But this is irrelevant for our purposes. The point is that liberalism embraces contradictory reasoning techniques for resolving the conflicts, whether that is to be done by the judiciary under a written constitution, by an all-powerful legislature, or through a system of "balance" without a "sovereign" in the positivist sense.

The instance of right/power conflict that is easiest to grasp in terms of the interpretation of private law is that occurring when an individual claims that a piece of legislation that purports to define rights as between private parties is really a mechanism for the violation of the rights of one group in the interest of another. In our system, the problem is that of deciding whether the exercise of legislative power complies with the express constitutional requirements of equal protection and *substantive* due

process. The claim of the right holder is essentially that there are liberal principles for the definition of private law rights of individuals *inter se*, as, for example, rules about what contracts are binding. The state's powers should be limited to making sure these rules are in force. But under cover of *defining* these rules, of settling alleged conflicts of rights, the state has in fact authorized one of the parties to the dispute to dominate the other. It has either violated the maxim of equality of right, or within the regime of equality, chosen a definition that is inconsistent with the proper derivation of particular rules from the liberal abstractions.

A conflict of this kind directly reproduces the dilemma of private law. If there is no internally coherent technique for performing these operations of derivation in the case of a wholly private dispute before a judge, then there is no way to perform the derivation when the same issue is posed between a right holder and the legislature. Thus in a famous case, the U.S. Supreme Court had to decide whether it was a violation of freedom of contract for a statute to prohibit railroads from binding their employees not to join labor unions. The Court held that such contracts were not made under duress; it followed as a mere matter of legal logic that they were an exercise of freedom, and therefore could not be prohibited.<sup>53</sup> Unless we are confident that the common law of duress provides criteria that clearly distinguish situations of "free will" from those of "coercion," this decision appears as the legalization of judicial prejudice.<sup>54</sup>

The purest case of power/power confrontation is probably that occurring between the units of a federal system. Here, the connection with the private law problem is much more obscure. As with all power/power conflicts, we have to keep in mind that we are dealing with *indirect* protections for private law rights. The multiplication of independent centers of legal power is supposed to check antiliberal tendencies, making it the more difficult to "subvert the constitution." The slogan of federalism, like that of equality or impersonality, is incapable in and of itself of resolving the inevitable conflicts within such a system, and yet the actual pattern of wealth and power within civil society may well

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53. *Coppage v. Kansas*, 236 U.S. 1 (1915).

54. Cook, *Privileges of Labor Unions in the Struggle for Life*, 27 YALE L.J. 779 (1918); Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923).

turn on the outcomes. Liberal thinkers therefore bring to bear precisely the same reasoning techniques they use in the private law context.

On the one hand, they may reason from the "nature" of the powers in question, hoping to resolve conflict without any reference at all to the impacts on interests that motivate conflict in the first place. The states are "sovereign within the sphere of their authority," and sovereignty is absolute dominion. It follows that the federal government cannot tax the performance of the official functions of the states. Alternatively, they reason from the general welfare: the issue of taxability depends not on "nature" of power, but on the consequences for the system of private rights of increasing or decreasing the degree of centralization of actual control within the system. As in the case of private law, the only difficulty is that each technique turns out to be plausibly manipulable, depending on how one frames the premises of the argument. "Sovereign within its sphere of authority" is a tautology, since the issue is the *extent* of authority. There is always a good argument for centralization as well as one for the dispersal of control (it all depends on where one sees the threat to private rights).<sup>55</sup>

This is not the place for a full cataloguing of the public law systems, with their analogous but distinct internal contradictions. Suffice it to say that the same small collection of argumentative techniques recurs, wedded to an infinite variety of fact situations, and a multiplicity of supposedly outcome-determining concepts. We identify modern liberalism as much or more with these reasoning techniques as with the categorical structure within which they operate.<sup>56</sup>

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55. See Katz, *supra* note 5, third essay; Deutsch, *Neutrality, Legitimacy and the Supreme Court: Some Intersections Between Law and Political Science*, 20 STAN. L. REV. 169 (1968); Gordon, *Introduction: J. Willard Hurst and the Common Law Tradition in American Historiography*, 10 LAW & SOC'Y REV. 9 (1975); Tushnet, *Truth, Justice and the American Way: An Interpretation of Public Law Scholarship in the 70's*, Part II (unpublished ms. 1978).

56. If this interpretation is correct, several consequences follow. A first is that it is simply a mistake to try to understand the history of liberal legalism in terms of conflict between the "philosophies" of utilitarianism and natural law. The rival schools within the liberal mode do express contradictory tendencies, but those same contradictions will be discovered over and over again within each of the supposed rivals. The gradual change in the pattern of outcomes cannot reflect changes in the balance of influence of the schools, because the schools themselves are not sufficiently internally coherent to "require" any particular pattern of outcomes.

A second consequence is more difficult to grasp but also more important. If it is true that liberal legalism is internally self-contradictory in the complex manner I have described, it is nonsense to assert that some particular arrangement of legal rules is the

## B. *The Legalization of Rights in the Commentaries*

Blackstone was very far from the modern liberal understanding, yet his work represented in two ways a clear advance in the formulation of the problem of conflict. First, he developed in a concrete and detailed fashion the model of liberal mediation through the rule of law, conceived as the domain of the judiciary. Second, he acknowledged the existence of a general problem of the conflict of rights, and proposed both a conceptual scheme and a mode of reasoning for resolving it in a reassuring manner. This section deals with this practice in particular cases; the next with his formulation of the problem of conflict in general.

Judges did not figure in 17th century liberal theory at all.

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"necessary" complement of capitalist economic organization, unless one is careful to define "capitalism" in a manner truly independent of liberal legal theory. The error here is the adoption of liberalism's *own* perspective for understanding its relation to capitalism. Liberal theorists have consistently argued that liberalism is a coherent system that requires the adoption of a particular set of definitions of rights. These liberal theorists employ some mix of deduction from postulates and appeal to the general welfare, and they claim that the validity of their reasoning legitimates the actual pattern of economic organization, self-consciously identified as capitalist.

It seems a promising radical tactic to identify "individual rights" with "private property in the means of production" and the "commodity form." The "general welfare" is another phrase for "development of productive forces." The radical critic can then turn liberalism "on its head," so to speak. The liberal premises amount to accepting the capitalist mode of production; the rules the liberals derive from those premises can then be understood as implicit in their initial ideological commitment. They flow from capitalism itself, rather than legitimating it. The "material" base of economic organization can then be understood to have found in the illusions of liberal legalism a mechanism for developing the superstructure of legal doctrines that would facilitate its progress. The 19th century legal structure of laissez-faire, for example, "met the needs" of capitalism at that stage.

The problem with this approach is that if liberal legal theory is internally self-contradictory, then it is simply not possible to derive the rule system from the postulates of rights and social welfare, whether we identify these as universally valid ethical premises or as a disguise for the interests of the capitalist class. If "capitalism" as a source of rules has, as its only definite content, liberal rights and liberal development theory, it cannot generate any explanation at all of the patterns of legal rules the "ruling class" adopted at different historical stages.

Of course, the inherent indeterminateness of liberal legal theory creates a great opportunity to show that there was an independent set of causal factors at work, shaping the choices between contradictory alternatives at each stage of evolution. If we could define capitalism *independently* of the liberal premises of rights and welfare, it might have real explanatory power. But legal historians writing in the revisionist mode have no such independent definitions to offer. What they *can* often do is to show that a particular interest group was convinced that it would gain by adoption of a particular legal rule, and that they dressed their self-interest in one or another of the contradictory forms of liberal legal rhetoric. This is always interesting, but has nothing to do with the "internal necessities" of capitalism. It is idealism masquerading as materialism to substitute "commodities" for "rights," and "development" for "social policy," and then play the liberal game of deriving the actual rules of the legal system as necessary consequences.

Hobbes and Locke saw the role of the state as the imposition of order on civil society, and each had a theory of what order consisted of. But they did not have or did not choose to present an institutional theory of how the state would go about the task of protecting rights. Montesquieu had identified the judiciary as a crucial component in such an institutional theory, but his very brief treatment simply emphasized that the judges must be independent.<sup>57</sup> Blackstone's approach made the idea of rights concrete, and infinitely more plausible than did earlier writers, because he described in some detail exactly what it meant in practice to *have* rights in a liberal state.

This concrete model of how the state would actually go about performing its sole legitimate function of guaranteeing rights put law and legal reasoning at the center at least of the *lawyers'* understanding of what liberalism was. It was the beginning of the working out of the fundamental contradiction within the technical specialty of legal thought, much as *The Wealth of Nations* was the beginning of its working out in the technical specialty of economics. The development sketched in the last section started with Blackstone. This section describes his paradigm of the lawsuit as a crucial framework for the testing of the idea of rights as a mediator.

### 1. *The Private Law Paradigm*

At the very beginning of the discussion of wrongs to property rights, Blackstone made the following statement:

1. And first of an unlawful *taking*. The right of property in all external things being solely acquired by occupancy . . . and preserved and transferred by grants, deeds, and wills, which are a continuation of that occupancy; it follows, as a necessary consequence, that when I have once gained a rightful possession of any goods or chattels, either by a just occupancy or by a legal transfer, whoever either by fraud or force dispossesses me of them, is guilty of a transgression against the law of society, which is a kind of secondary law of nature. For there must be an end of all social commerce between man and man, unless private possessions be secured from unjust invasions: and, if an acquisition of goods by either force or fraud were allowed to be a sufficient title, all property would soon be confined to the most strong, or the most cunning; and the weak

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57. C. DE MONTESQUIEU, *THE SPIRIT OF THE LAWS*, Book 11, ch. 6 (rev. ed. New York 1899).

and simple-minded part of mankind (which is by far the most numerous division) could never be secure of their possessions.  
[III-145]

This passage presents all the elements of the liberal mode of mediating the fundamental contradiction in private law. There is a strong, cunning man and a weak, simple-minded man. The strong man's claims are disposed of through a series of more and less explicit arguments. First, there is the assertion that the weak man has "rightful" possession, based on "just" occupancy and "legal" transfer. Blackstone postulated an external authority (contract, statute, precedent) that had established the weak man's right so that the judge was merely enforcing rules to which the strong man had no legal objection. Reasoning from the postulated right, Blackstone was able to conclude that a forceful or fraudulent taking of the thing was illegal. On the one hand, this was a "necessary consequence" of the existence of the right; on the other, it followed from a consideration of the disastrous impact on general welfare that would occur if taking were permitted. The state could therefore step in with its own force, providing a remedy for an unquestionable wrong, without the slightest fear that it was merely substituting public for private tyranny. Once rights were secured through tort law, the parties were able to engage in "social commerce" (good fusion) on the basis of "legal transfer" (contract).

The passage also illustrates, *for us*, the problematic character of even the simplest piece of liberal legal reasoning. First, Blackstone has constructed the postulated property right, on the basis of convenience, from a natural right which is only to occupancy *for use*. We are dealing with an offense against the "law of society," which is only a "secondary" law of nature. Unless the derivation of social from natural law is valid, the rest of the reasoning is unpersuasive. (Suppose the defendant is a landless peasant seizing a small part of the estate of a large landowner after many years of working as a sharecropper.) Second, "force and fraud" are extremely vague, and the characterization of the taking as "unlawful," an "unjust invasion," is question-begging if we are concerned with the judge's discretion. It is by no means clear, *to us*, that the judge will be able to derive, either by deduction or from the general welfare, specific subrules about force and fraud that preserve the apparent neutrality and universal acceptability of his general principle.

In spite of these difficulties, it is easy to see the power of the liberal paradigm in this case. That some things are property, some of the time, and for some purposes, seems merely "common sense." Likewise that some methods of dispossession are just plain *wrong*. Blackstone has related these sentiments to the actual rules in force by reference to familiar modes of reasoning. He has told us over and over again that the judge is a passive conductor of "the law," that his "sentence" is not his own but that of "the law." So long as we are in this frame of mind, it is easy to suppress awareness that we are dealing here with a *conflict* of rights, and that the resolution of the conflict has implicit within it social choices that decisively influence every aspect of the distribution of power and welfare. In short, if we can believe in Blackstone's framework, we escape the sense of contradiction. It appears that the state has at the same time freed us of domination by others within civil society and given us a basis for satisfying our need for interaction with them.

## 2. *The Public Law Paradigm*

The public law paradigm was simply an application of that of private law in a new area. The fundamental principle with respect to personal security was that "the constitution is an utter stranger to any arbitrary power of killing or maiming the subject without the express warrant of law." [I-133] The right of personal liberty "cannot ever be abridged at the mere discretion of the magistrate, without the explicit permission of the laws." [I-134] As for private property, "no freeman shall be disseised, or divested, of his freehold, or of his liberties, or free customs, but by the judgment of his peers, or by the law of the land." [I-138-39]

In the public law paradigm, the executive official is the strong, cunning man, and the private right bearer is the weak, simple-minded man. As in the private law situation, "the law" rectifies this imbalance, "for if once it were left in the power of any, the highest, magistrate to imprison arbitrarily whomever he or his officers thought proper . . . there would soon be an end of all other rights and immunities." [I-135] This did not mean that executive officers were *no different from* individuals in their relations with private right holders. The law defined the weak man's rights against other private individuals, and then prohibited the executive officer from invading those private law rights *unless* he

could point to a specific rule that reduced those rights *as against him*. Right/power conflict was a special case of right/right conflict, rather than being either identical to it or *sui generis*.

As in the private law context, Blackstone recognized that the judge needed explanations of the choices he had to make in defining the extent of executive power, that is, in defining the respects in which the right/power boundary allowed the executive to do things to an individual that would be illegal if done by another private party. Blackstone, in other words, did more even in the simplest paradigmatic cases than rely on the fixity and impersonality of legal rules. He reasoned from the consequences of one or another definition of executive power, and at the same time made deductions from the nature of power: "To assert an absolute exemption from imprisonment in all cases, is inconsistent with every idea of law and political society; and in the end would destroy all civil liberty, by rendering its protection impossible." [III-133]

Given their similar structure, Blackstone could treat the private and public law conflicts together when he came to state the "subordinate" rights of Englishmen established to guarantee the primary or "absolute" rights: "Since the law is in England the supreme arbiter of every man's life, liberty, and property, courts of justice must at all times be open to the subject, and the law be duly administered therein. . . . It were endless to enumerate all the *affirmative* acts of parliament, wherein justice is directed to be done according to the law of the land; and what that law is every subject knows, or may know, if he pleases; for it depends not upon the arbitrary will of any judge, but is permanent, fixed, and unchangeable, unless by authority of parliament." [I-141-42]

The two paradigm cases of "unlawful" private taking of property and "arbitrary" executive invasion of private rights were *apparently* simple and unproblematic. The paradigm cases represent a satisfying kernel of "legal analysis" that Blackstone extended to cover all of law. The *Commentaries* contained thousands (quite literally) of instances of this activity of simultaneous mediation and legitimation through legal reasoning. For the activity to succeed, these had simply to overwhelm the reader's critical faculties, lulling him into a vague sense that, page after page, Blackstone was making each conflict, each potentially excruciating encounter of living subjects, somehow "all right."

In producing this picture, he both extended the liberal schema



from politics to law, and presented his successors, whether or not they were liberals, with a field for criticism. It was this process of criticism, sometimes meant "constructively" as a means to better legitimate the status quo, sometimes put forward as a means to reform particular rules by showing they had no rational support, and sometimes animated by revolutionary intentions, that gradually sapped the mediating capacity of the idea of rights. The next subsection lists Blackstone's favorite techniques, the initial set of mechanisms for finding a prior consent, a basis for deduction, or an argument from convenience, whenever the proper resolution of conflict might otherwise have been in doubt. In part because they were his favorites, these were also the first targets for the critical activity of his 19th century successors. This, in turn, makes it particularly easy, for *us*, to understand them in terms of mediation or denial.

### 3. *Mediation in Particular Cases*

Blackstone appealed to contracts, statutes, and precedents continuously throughout the *Commentaries*. But, as we have seen already, he constantly employed a further consensual argument by "implication." Through it, he could generate authoritative starting points for reasoning at a very abstract level, as in: "it is one of the characteristic marks of English liberty, that our common law depends upon custom; which carries this internal evidence of freedom along with it, that it probably was introduced by the voluntary consent of the people." [I-74] Here, as when he used implication to justify the powers of Parliament or some particular instance of royal authority, the device performed functions we now allocate to written constitutions or to other explicit law making processes. But Blackstone also implied great numbers of more specific obligations. "[U]pon a stated account between two merchants . . . the law implies that he against whom the balance appears has engaged to pay it to the other; though there be not any actual promise." [III-162] And so forth.

The implication of consent presupposed an individual right holder entitled to resist the demands of another person. But the *actual* right holder, stubbornly refusing to do his social duty, disappeared in the process of implication, transformed by legal reasoning into a docile character who always wanted to do what he ought to do. The imputation of responsibility for the result to this

imaginary person's imaginary wishes suppressed the awareness of conflict. The problem of precisely defining the limits of the individual's necessary subjection to the interests of others could not appear clearly until legal thinkers recognized implication as circular and question-begging. There is not even a hint of such a recognition in the *Commentaries*.

Nor is there a hint of skepticism about the meaningfulness of Blackstone's favorite forms of deductive reasoning. The extremes of these are already familiar from our discussion of property law—they are the reifications of incorporeal hereditaments, choses in action, and estates in land. They allowed him to explain the failure of a remainder without even a *suggestion* of conflict; “the thing supported must fall to the ground, if once its support be severed from it.” [II-168] The concepts of estate, chose in action and incorporeal hereditament are all reifications from property law, but the same technique appeared in the law of persons. For example, the vesting of the wife's property in the husband at marriage “depends entirely on the notion of an unity of person between the husband and wife; it being held that they are one person in law, so that the very being and existence of the woman is suspended during the coverture, or entirely merged or incorporated in that of the husband.” [II-433] New members of a corporation—say a town government—acquired the corporate property “because in judgment of law a corporation never dies: and therefore the predecessors, who lived a century ago, and their successors now in being, are one and the same body corporate. Which identity is a property so inherent in the nature of a body politic that, even when it is meant to give any thing to be taken in succession by such a body, that succession need not be expressed: but the law will of itself imply it.” [II-430. *See also* II-409, 417]

These are not examples of “prerational” thought. Blackstone was insistent that the legal unity of husband and wife, the immortality of corporations, and, for that matter, the legal “perfection” of the king were complicated ways of pursuing the “convenience of civil society.” [I-55, 467, 246] He was also careful always to point out the ways in which the student might be misled by the fictional entity or attribute. Yet once he had given the initial argument from convenience, the rest of the rules flowed from the fiction, or contradicted it. There was no further recourse to that argument, and no apparent awareness that each particular subrule posed again, within the institution, all the problematic conflicts

that led to its establishment in the first instance. This was denial in a quite pure form: he recognized the conflict and then made it disappear, yet knew he was making it disappear, yet still affirmed that it had disappeared.

By contrast, Blackstone's treatment of the argument from convenience had a much more modern ring. There was occasionally even an acknowledgment of a conflict of policies, and thence of rights, within the law, if never an acknowledgment of a flat contradiction. For example, he justified the cutting off of an owner's property rights by sale in market overt on the ground that "it is expedient that the buyer, by taking proper precautions, may at all events be secure of his purchase; otherwise all commerce between man and man must soon be at an end." [II-449] But the buyer obtained this security only where he was ignorant of the circumstances of real ownership; and there was a series of exceptions that made it *impossible* for the buyer to be absolutely secure. Blackstone characterized the resulting collection of rules as "wise regulations" by which "the common law has secured the right of the proprietor in personal chattels from being divested, so far as was consistent with that other necessary policy, that purchasers, *bona fide*, in a fair, open, and regular manner, shall not be afterwards put to difficulties by reason of the previous knavery of the seller." [II-450]

He adopted a similar attitude toward the problem of property rights in business good will:

If a ferry is erected on a river, so near another ancient ferry as to draw away its custom, it is a nuisance to the owner of the old one. For where there is a ferry by prescription, the owner is bound to keep it always in repair and readiness, for the ease of all the king's subjects . . . it would be therefore extremely hard, if a new ferry were suffered to share his profits, which does not also share his burthen. But where the reason ceases, the law also ceases with it: therefore it is no nuisance to erect a mill so near mine, as to draw away the custom, unless the miller also intercepts the water . . . for by such emulation the public are like to be gainers; and, if the new mill or school occasion a damage to the old one, it is *damnum absque injuria*. [III-219. See also I-427-28]

Blackstone scattered these instances of recognition of the existence of two conflicting policies, and of the necessity of legal choice between them, over a range of fact situations, here and there through the *Commentaries*. There is no apparent pattern to their appearance, and he does not seem to have seen them as

in any way inconsistent with his more usual manner of explaining rule systems. The reference to the "wisdom" of the rules, or to the notion of the law stopping with the reason of the law, were no further elaborated, as though the correctness and legality of the particular compromise of conflicting policies were self-evident.

Convenience and implication differ from Blackstone's reifications because they made the rules flow from the needs and intentions of human actors rather than from the "natures" of fictitious things. But in each case, the device fell well short of the frank recognition of conflict. While implication presupposed right holders voluntarily relinquishing their claims, "convenience" predicated "civil society," which had needs, and the needs appeared as unequivocal. Sometimes the need was for order at any price; sometimes for the productive energies generated by a regime of minimal duties between individuals. But the appeal suppressed the simultaneous existence of both needs, by recognizing only one in any given situation. In doing so, it merged the factual antagonism of commercial rivals, like that of oppressors and oppressed, in the imaginary harmony of society.

The problem of conflict was present in the *Commentaries*, but it was not the central preoccupation it was later to become. The first reason for this was simply that the sensitivity of the distribution of power and welfare to the design even of a system of formally equal private law rules is something that liberals came to understand only through a long course of historical practice and study. Blackstone, as we saw in the last Part, was intensely aware of the difference between a "feudal" regime of property law and one based on "liberty" and "commercial policy." He was thus aware that conflicting interpretations of what rights ought to be could lead to different kinds of societies based on those interpretations. But he seems to have accepted the coherence of the new regime pretty much as a given. He relegated conflict, and judicial creativity in resolving it in a transformative way, to the past.

We should not underestimate the influence of general social complacency on Blackstone's thought. He was oblivious to conflict in part because he lived in an age in which the elite was self-satisfied, the opposition weak and unimaginative. Litigation was rare, by our standards, and the notion of pursuing interest group struggles through the courts was well over the horizon. Although the system of precedent was much less developed than it is today,

it may have seemed much more adequate as an explanation of what judges do. Finally, because the stakes are so high and the pretense of legality so important to the legitimacy of the activity, the institution of judicial review under a written constitution puts intense strains on whatever techniques of legal reasoning the judges employ in executing their task. The result, in the United States, is a level of self-consciousness about the plasticity of reasoning techniques that is likely to be absent, even today, in countries where the judges never have to try out their mystique against blatantly "political" questions.

As will be seen in the next installment of the drama, a crucial initial stage in the process of integration and disintegration of liberal legalism was the gradual recognition that implied consent, the reification of interests in property, and the one-sided argument from convenience, were charades. But while they worked, they were genuine mediators. They made it possible to extend the paradigms of force or fraud against property and executive arbitrariness to dozens and dozens of particular cases that might otherwise have put the theorist up against the fundamental contradiction. And by purging contradiction from the detailed treatment of the total legal system, they made it possible for Blackstone to deal openly, and he thought convincingly, with the problem of conflict at the abstract level of social contract theory. The next section describes this abstract treatment, which was perhaps his most enduring contribution to the liberal mode of mediation.

### C. *Civil Society in the Commentaries*

#### 1. *The Notion of Civil Society as an Intermediate Term*

The 17th century liberal theorists developed the idea that the function of the state was to guarantee order within the realm of private social interaction called civil society. But Hobbes and Locke had radically different conceptions of the implications of this notion for the content of the legal system. While both identified sovereignty with the power to make and enforce the laws, Hobbes saw the content of laws as intrinsically arbitrary. In this view, what happens in civil society is the consequence of legislative choice within a very wide range: the state *creates* the society as well as ordering it.

In Locke, by contrast, the sole function of the state was to

enforce the law of nature by resolving disputes about the definition of that law, and assuring its impartial execution. In this conception, the order the state imposes preexists it. The state merely makes it possible to realize in practice the specific structure for interaction that would have existed all along, had men not tended to be biased in their own favor when allowed to be judges in their own cases. These two views correspond to what I called earlier the choice between a positivist and a natural rights conception of the origin of the rights that mediate the contradiction.<sup>58</sup>

We have seen already that Blackstone adopted *both* the view that there were natural rights *and* the view that there existed in Parliament an absolute and uncontrollable sovereign power. And we have also seen in great detail that Blackstone most emphatically did *not* regard the regulations defining hierarchy and property as merely a positivized, state-enforced version of the law of nature. It was true that with respect to natural rights, "[the] legislature . . . acts only . . . in subordination to the great lawgiver, transcribing and publishing his precepts." [I-54]

But, with regard to things in themselves indifferent, the case is entirely altered. These become either right or wrong, just or unjust, duties or misdemeanors, according as the municipal legislator sees proper, for promoting the welfare of the society, and more effectually carrying on the purposes of civil life. Thus our own common law has declared, that the goods of the wife do instantly upon marriage become the property and right of the husband; and our statute law has declared all monopolies a public offense: yet that right, and this offence, have no foundation in nature, but are merely created by the law, for the purposes of civil society. And sometimes, where the thing itself has its rise from the law of nature, the particular circumstances and mode of doing it become right or wrong, as the laws of the land shall direct. Thus, for instance, in civil duties; obedience to superiors is the doctrine of revealed as well as natural religion: but who those superiors shall be, and in what circumstances, or to what degrees they shall be obeyed, it is the province of human laws to determine. [I-55]

It is worth noting in passing that the last sentence of the quoted paragraph "goes very far" in cutting the hierarchical institutions of 18th century English society loose from any grounding in "nature" or even reason.

The rules of civil society were thus distinct from those of the

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58. See Part II (C) 1 *supra*.

state of nature, so that law did more than legalize a preexisting order. But Blackstone differed from Hobbes as well as from Locke. Civil society had, in his mind, a being and a content distinct from the choices made by those in control of the governmental apparatus. Society was no more a mere reflection of power than it was a reflection of nature. It was possible to speak of its form and its requirements as though they were something that *both* individuals and the state responded to. This is clear in his general formulation of the social contract:

For when civil society is once formed, government at the same time results of course, as necessary to preserve and keep that society in order. Unless some superior be constituted, whose commands and decisions all the members are bound to obey, they would still remain as in a state of nature, without any judge upon earth to define their several rights, and redress their several wrongs. [I-47-48. See also IV-7-8]

Civil society was a genuine intermediate term between the state and the state of nature. It was formed by individuals as a pattern of activity distinct from their previous life "unconnected" with one another, with "no occasion for any other laws than the law of nature, and the law of God." [I-43] Once it existed, people found themselves bound to new duties, which Blackstone summarized as "to contribute . . . to the subsistence and peace of the society." [I-45] The word "public" often referred to this post-natural social pattern rather than to the state. [*E.g.*, I-122, 124; IV-5, 177]

## 2. *Civil Society as a Restraint Both on Liberty and on Power*

Blackstone's initial presentation of the notion of civil society contained no reference to a conflict between its rules—the relative rights of persons and the rights of things—and the regime of natural and divine law that existed in the state of nature. In the initial version, they were simply coexisting spheres. It was true that the law of nature was "superior in obligation to any other. It is binding over all the globe, in all countries, and at all times: no human laws are of any validity, if contrary to this." [I-41] But there was no contradiction in the existence of a "great number of indifferent points in which both the divine law and the natural leave a man at his own liberty, but which are found necessary,

for the benefit of society, to be restrained within certain limits." [I-42]

There was a hint of difficulty, nonetheless, even in the initial formulation. The regime of regulation "restrained" people where natural law left a man "at his own liberty." In the sentence quoted, Blackstone presented natural and divine laws as one set of restraints, and the rules of civil society as another. They did not conflict because they dealt with different subject matters. But he also believed that natural and divine law were the basis of natural rights: "[t]hose rights which God and nature have established, and are therefore called natural rights, such as are life and liberty, need not the aid of human laws to be more effectually invested in every man than they are." [I-54] While it is easy to conceive of the laws of civil society as a nonoverlapping set of constraints co-existing with natural law, the existence of natural rights, including "liberty," seems to imply an *absence* of regulation. And if this was the case, there was a radical contradiction between the existence of natural rights and the laws of civil society.

While there was no more than a hint of this difficulty in Blackstone's introductory chapter on "Law in General," it was the principal theme of his chapter on the "Absolute Rights of Persons," which began the discussion of the positive law of England. As we have seen, he there posited the "natural liberty of mankind," which "consists properly in a power of acting as one thinks fit, without any restraint or control, unless by the law of nature; being a right inherent in us by birth, and one of the gifts of God to man at his creation, when he endued him with the faculty of freewill." [I-125] He recognized that the creation of civil society, which included the state apparatus guaranteeing "absolute" (not "natural") rights, involved a massive interference with man's "wild and savage liberty," his "absolute and uncontrolled power of doing whatever he pleases." [*Id.*] Men "give up" natural liberty; it was the "price" of the "purchase" of security for the remaining absolute rights [*Id.*]; those rights were the mere "*residuum* of natural liberty, which is not required . . . to be sacrificed to public convenience;" [I-129] "political . . . or civil liberty . . . is . . . natural liberty . . . restrained by human laws." [I-125]

This is, unequivocally, the language of the conflict of right with right. Blackstone here stated it abstractly, but in the body of the *Commentaries*, he very occasionally acknowledged its existence in particular cases. For example, a stranger's seizure of a



man's goods at his death was "agreeable to natural justice, considering man merely as an individual," but "diametrically opposite to the law of society . . . which, for the preservation of public peace, hath prohibited . . . all acquisitions by mere occupancy." [III-168] Civil society—hierarchy and property—was *at the expense* of, as well as *in aid* of natural liberty.

But while this is unequivocally the language of conflict, it is no less clearly the language of contract. The "giving up" of a "price" for a "purchase" was a consensual process. The obligation "to conform to those laws, which the community has thought proper to establish" was "in consideration of receiving the advantages of mutual commerce." [I-125] "For no man, that considers a moment, would wish to retain the absolute and uncontrolled power of doing whatever he pleases: the consequence of which is, that every other man would also have the same power; and then there would be no security to individuals in any of the enjoyments of life." [*Id.*] The "original contract of society" was that the "community should guard the rights of each individual member, and that (in return for this protection) each individual should submit to the laws of the community; without which submission of all it was impossible that protection should be certainly extended to any." [I-48]

The residuum of natural liberty, positivized as absolute rights, along with the social institutions of hierarchy and property, thus represented an authoritative resolution of the conflict between natural rights defined as freedom of action ("liberty"), and an argument from "security" and "protection" based ultimately on convenience. Blackstone grounded this authoritative compromise not in constitutions, statutes, precedents, or express contracts, but in the much vaguer and more manipulable notion of an implied consent.

At this point in the discussion, it may appear that Blackstone was very like Hobbes. It is true that he recognized the existence of natural rights. But a blanket implied consent to the regulation of natural liberty for the convenience of civil society seemed to reduce those rights to insignificance. The conflict of liberty and security posed the fundamental contradiction, and Blackstone appeared to resolve it by allowing the group to annihilate the individual's freedom of action "as the municipal legislator sees proper." It might be that "the principal aim of society is to protect individuals in the enjoyment of those absolute rights, which were

vested in them by the immutable laws of nature." [I-124] But the content of this category was residual. It was what was left over after regulation, along with "those civil privileges, which society hath engaged to provide, in lieu of the natural liberties so given up by individuals." [I-129]

Yet here again Blackstone was no more like Hobbes than he was like Locke. The convenience of civil society was more than a justification for invading liberty in the interest of security: it could settle the conflict between them. The municipal legislator was free to do as he saw fit, but only for "more effectually carrying on the purposes of civil life;" [I-55] "restraint" was "for the benefit of society" [I-42], and these limits on the choice of a definition of rights turned out to have some concrete meaning. The legislature was not subject to judicial review, and Blackstone did not think it should be, but we are speaking here of reasoning techniques for the resolution of the conflict of rights, not of institutional checks. Though there might be no remedy at law, he could say that:

Political, therefore, or civil liberty, which is that of a member of society, is no other than natural liberty so far restrained by human laws (and no farther) as is necessary and expedient for the general advantage of the public. . . . [E]very wanton and causeless restraint of the will of the subject, whether practised by a monarch, a nobility, or a popular assembly, is a degree of tyranny: nay, . . . even laws themselves, whether made with or without our consent, if they regulate and constrain our conduct in matters of mere indifference, without any good end in view, are regulations destructive of liberty. [I-125-26]

He then offered two examples: regulations of dress "savoured of oppression; because, however ridiculous the fashion . . . the restraining it by pecuniary penalties could serve no purpose of common utility." [*Id.*] On the other hand, the requirement that the dead be buried in woolen shrouds was "consistent with public liberty; for it encourages the staple trade, on which in great measure depends the universal good of the nation." [*Id.*]

The idea of convenience provided a criterion for deciding conflicts of natural liberty even with legislative power itself, though, again, there was no judicial institution to enforce the correct decision once made. Blackstone asserted "that whenever the *constitution* of a state vests in any man, or body of men, a power of destroying at pleasure, without direction of laws, the lives or members of the subject, such constitution is in the highest

degree tyrannical; and that, whenever any *laws* direct such destruction for light and trivial causes, such laws are likewise tyrannical." [I-133] It was only "when the state is in real danger" that Parliament could suspend the writ of habeas corpus, "for a short and limited time." [I-136]

[C]rimes and misdemeanors are a breach and violation of the public rights and duties owing to the whole community, considered as a community, in its social aggregate capacity. And . . . human laws can have no concern with any but social and relative duties being intended only to regulate the conduct of man, considered under various relations, as a member of civil society . . . and of consequence private vices or breach of mere absolute duties, which man is bound to perform considered only as an individual, are not, cannot be, the object of any municipal law, any farther than as by their evil example, or other pernicious effects, they may prejudice the community. [IV-41]

Blackstone expressed a "doubt, how far a human legislator ought to inflict capital punishments for *positive* offences; offences against the municipal law only, and not against the law of nature: since no individual has, naturally, a power of inflicting death upon himself or others for actions in themselves indifferent." [IV-9] As we have seen, the criminal law with respect to the established church had as its justification that "the preservation of christianity, as a national religion, is, abstracted from its own intrinsic truth, of the utmost consequence to the civil state." [IV-43] Given this rationale, "particular modes of belief or unbelief, not tending to overturn christianity itself, or to sap the foundations of morality, are by no means the object of coercion by the civil magistrate." [IV-45] Death for apostasy was "a heavier penalty than the offence, taken in a civil light, deserves." [IV-44]

The notion of civil society was thus much more than an intermediate term. Because it had its own logic of convenience and its own moral basis in implied consent, it could legitimate the invasion of the natural liberty to do whatever one wanted, in the interests of the general welfare, thereby resolving the conflict of right with right. In public law, it both legitimated *and restrained* the invasion of the natural right to unrestricted freedom of action by the absolute and uncontrollable power of sovereignty.

Given that he believed in the existence of civil society as an entity, and in the meaningfulness of the arguments from convenience and implied consent on which it was based, Blackstone could affirm that "the law, which restrains a man from doing mis-

chief to his fellow-citizens, though it diminishes the natural, increases the civil liberty of mankind." [I-125-26]

[L]aws, when prudently framed, are by no means subversive, but rather introductive of liberty; for, as Mr. Locke has well observed, where there is no law there is no freedom. But then, on the other hand, that constitution or frame of government, that system of laws, is alone calculated to maintain civil liberty, which leaves the subject entire master of his own conduct, except in those points wherein the public good requires some direction or restraint. [I-126]

In the next sentence we learn that this *possibility* of mediating the fundamental contradiction has already been achieved: "The idea and practice of this political or civil liberty flourish in their highest vigour in these kingdoms, where it falls little short of perfection, and can only be lost or destroyed by the folly or demerits of its owner: the legislature, and of course the laws of England, being peculiarly adapted to the preservation of this inestimable blessing even in the meanest subject." [I-126-27]

### 3. *Civil Society as a Mediator of Contradiction*

There was a good deal of irony in Blackstone's citation of Locke on laws as introductive of liberty, followed by his own addendum that they must have a libertarian *content*. Locke, like Hobbes, had been concerned not with the content of legislation but with the location of legislative power. Laws introduced liberty because they signified simultaneously the restriction of absolute royal power and the regularization of private conduct—in short, they represented liberty as security from arbitrariness.<sup>59</sup> Given these benefits, Locke<sup>60</sup> thought it easy and Hobbes thought it impossible<sup>61</sup> to take the next step, and legitimate laws through a substantive theory of right/right and right/power conflict. Blackstone sounded as though his attitude were more libertarian, more demanding of legitimacy than Locke's, but in fact he was less so. His formula boiled down to individual rights of freedom of ac-

59. J. LOCKE, *supra* note 8, at §§ 57, 202.

60. *Id.* at § 12.

61. T. HOBBS, *supra* note 8. "To the care of the Sovereign, belongeth the making of Good Lawes. But what is a good Law? By a Good Law, I mean not a just Law: for no Law can be Unjust. The Law is made by the Sovereign Power, and all that is done by such Power, is warranted, and owned by every one of the people; and that which every man will have so, no man can say is unjust. It is in the Lawes of a Commonwealth, as in the Lawes of Gaming: whatsoever the Gamesters all agree on, is Injustice to none of them." *Id.* at 185.

tion so far as consistent with the general welfare. The general welfare required hereditary monarchy, nobility, and the established church; a standing army, and the patriarchal organization of workplace and family.

But all of this is beside the point, if we are concerned with Blackstone as a contributor to the liberal mode of mediation of the fundamental contribution. It is not that he misrepresented Locke, generating crowned heads, titles, and parsons from a theory whose mission was to destroy them. What counts is that he went beyond him in two ways. First, he offered a framework within which liberalism could claim to possess a *method*, in place both of Locke's optimism that the positivization of natural law was an intrinsically simple operation, and of Hobbes' notion that it is in laws as in gaming, whatever all the players agree is injustice to none.<sup>62</sup> Blackstone would have us believe that the rule of law can define rights even where they appear to conflict. The paradigm of the judge who prevents a taking that is by definition "unlawful" because corrupted by "force or fraud" could then serve to organize and justify the judge's activity in *all* cases, rather than only in those somehow settled in advance.

Second, he offered a particular version both of conflict and of its resolution. In the first section of this Part, I argued that within the liberal mode of thought there are two pairs of argumentative strategies for resolving the conflict of right with right. There is an argument that deduces rights from the postulate of freedom of action, and one that deduces them from the postulate of security. There is a general welfare argument based on the incentive provided by protection of welfare positions, and another based on the incentives provided by free competition and self-reliance. Blackstone's version of the conflict between natural liberty in the state of nature and the convenience of civil society was one way in which this structure could be applied in practice. He opposed a deduction from freedom of action (natural liberty in the state of nature) to an argument for security based on the general welfare (the convenience of civil society). From the confrontation of the two there emerged the absolute and relative rights of persons. Some of these represented the triumph of freedom of action and some of them represented security. *All* of them were fully legal. The absolute and relative rights, once established, could serve as the basis for

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62. *Id.*

further deductions and further arguments from convenience, generating the vast collection of rules actually in force.

Blackstone developed his structural opposition between natural liberty and the general welfare achieved through regulation as an aspect of his strategy for legitimating the "artificial" institutions (feudal and capitalist) of the legal system of his time. He devised a sort of compromise in which both hierarchical formal inequality and substantive inequality through property rights could seem to flow from the postulated equality of the state of nature. But the devices he employed transformed and greatly strengthened the theory on which they were parasitic. Rights were, and are, much more plausible if we can base their definition simultaneously on a libertarian logic of "nature" and on the "only apparently" contradictory needs of the community.

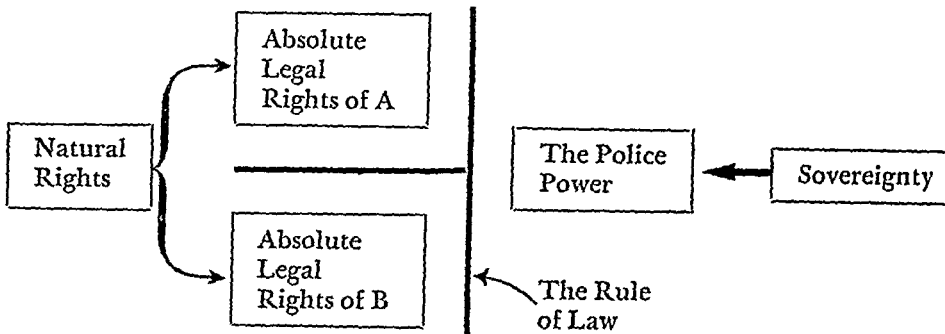
To my mind, Blackstone's enduring success in America is better explained in these terms than in the more prosaic and therefore more plausible ones that come readily to mind.<sup>63</sup> It is true that the *Commentaries* were the only convenient way for several generations of American lawyers to learn law. His very irrelevance to 19th century America made him an invaluable asset in the professional game of rendering professional knowledge inaccessible to the layman. And there were his fragmentary but important contributions to particular aspects of liberal theory, like the separation of powers or executive subordination to the rule of law. His histories of land law and of the gradual constriction of royal prerogative through the rise of the commons gave 19th century American law both a sense of where it came from and a sense of where it was going.

But Blackstone stood for more than any of these. The pre-legal natural liberty of antagonistic individuals became, in conflicts mediated by the ideas of convenience and implied consent, the fully legal absolute and relative rights of persons. That same natural liberty, clashing with sovereignty, began its transmutation into the legal but limited constitutional rights against the state of American citizens. Sovereignty—unrestrained and unrestrainable state power—went through its own transformation. In the same conflict that limited and legalized natural liberty, the mediation of convenience and implied consent turned sovereignty into something like our legislative police power. The relations of men in the

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63. See Nolan, *Sir William Blackstone and the New American Republic: A Study of Intellectual Impact*, 51 N.Y.U.L. REV. 731 (1976).

state of nature, and the relation of natural right to sovereignty, were conundrums of political theory. But the relations of legal rights to one another and to the police power were *legal* problems. A final picture may help here:



The body of the *Commentaries*, seen in this light, was a vast explication of the single notion that the conflict of right with right was illusory, and that the same was therefore true of the conflict of right with power. Where Hobbes and Locke were opposite sides of a coin, Blackstone argued that law was *the coin itself*. He invited generations of liberal legal thinkers to find legal answers to the problem of conflict, because he presented the problem at the same time as the linchpin of liberal theory, and as a surmountable challenge to theoretical ingenuity. The enterprise goes on to this day, sustained in bankruptcy, like the rail system or a defense conglomerate, by the combination of naivete, self-interest and fear of the alternatives. But even thus reduced, it still plays the role Rousseau identified: "The strong is never strong enough to be always the strongest, unless he transforms strength into right, and obedience into duty."<sup>64</sup>

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64. J. ROUSSEAU, *THE SOCIAL CONTRACT AND DISCOURSES* 6 (Everyman ed. 1950).